















The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1964





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## **The Commonwealth of Massachusetts**

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BOSTON, DECEMBER 7, 1964

*To the Honorable Senate and House of Representatives:*

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1964.

Respectfully submitted,

*Attorney General*



**The Commonwealth of Massachusetts**  
**DEPARTMENT OF THE ATTORNEY GENERAL**

*Attorney General*  
**EDWARD W. BROOKE**

*First Assistant and Deputy Attorney General*  
**EDWARD T. MARTIN**

*Assistant Attorneys General*

|                                   |                                |
|-----------------------------------|--------------------------------|
| SAMUEL ADAMS <sup>12</sup>        | ROBERT L. HERMANN <sup>4</sup> |
| GEORGE W. ARVANITIS <sup>3</sup>  | LEE H. KOZOL                   |
| RICHARD E. BACHMAN <sup>8</sup>   | CARTER LEE                     |
| JAMES W. BAILEY                   | GAEL MAHONY <sup>5</sup>       |
| AILEEN H. BELFORD                 | GLENDORA J. MCILWAIN           |
| AUGUSTUS J. CAMELIO <sup>13</sup> | PAUL F. X. POWERS              |
| WILLIAM I. COWIN <sup>2</sup>     | THEODORE REGNANTE, SR.         |
| NELSON I. CROWTHER, JR.           | WALTER J. SKINNER              |
| JAY L. FIALKOW <sup>3</sup>       | JOHN E. SULLIVAN               |
| SAMUEL W. GAFFER                  | EDWARD M. SWARTZ               |
| BENJAMIN GARGILL                  | HERBERT F. TRAVERS, JR.        |
| LEONARD GLAZER <sup>6</sup> 7     | HERBERT E. TUCKER, JR.         |
| BERTHA L. GORDON <sup>1</sup>     | DAVID L. TURNER                |
| DAVID W. HAYS <sup>1</sup>        |                                |

*Assistant Attorney General: Director, Division of Public Charities*  
**JAMES J. KELLEHER**

*Assistant Attorneys General assigned to Department of Public Works*

|                                    |                      |
|------------------------------------|----------------------|
| ROBERT A. BELMONTE                 | VICTOR L. HATEM      |
| BURTON F. BERG                     | FOSTER HERMAN        |
| JOHN S. BOTTOMLY                   | RICHARD A. HUNT      |
| FRANK H. FREEDMAN                  | RUDOLPH A. SACCO     |
| FREDERIC E. GREENMAN <sup>11</sup> | JULIAN SOSHNICK      |
| JAMES N. GABRIEL                   | FRED D. VINCENT, JR. |
| JOHN J. GRIGALUS                   | HENRY G. WEAVER      |

*Assistant Attorneys General assigned to Metropolitan District Commission*

|                      |             |
|----------------------|-------------|
| ARTHUR S. DRINKWATER | JOHN WRIGHT |
| ROBERT B. SHEIBER    |             |

*Assistant Attorneys General assigned to Div. of Employment Security*

|                 |                               |
|-----------------|-------------------------------|
| JOSEPH S. AYOUB | WILLIAM H. LEWIS <sup>9</sup> |
|-----------------|-------------------------------|

*Assistant Attorney General assigned to Veterans' Division*

|                                   |                    |
|-----------------------------------|--------------------|
| DONALD W. WHITEHEAD <sup>10</sup> | ROGER H. WOODWORTH |
|-----------------------------------|--------------------|

*Chief Clerk*

**RUSSELL F. LANDRIGAN**

*Head Administrative Assistant*

**EDWARD J. WHITE**

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<sup>1</sup> Appointed, July 1, 1963

<sup>2</sup> Appointed, July 17, 1963

<sup>3</sup> Resigned, August 15, 1963

<sup>4</sup> Appointed, August 22, 1963

<sup>5</sup> Resigned, September 15, 1963

<sup>6</sup> Appointed, September 25, 1963

<sup>7</sup> Resigned, November 20, 1963

<sup>8</sup> Appointed, November 21, 1963

<sup>9</sup> Appointed, December 10, 1963

<sup>10</sup> Resigned, February 3, 1964

<sup>11</sup> Appointed, March 9, 1964

<sup>12</sup> Resigned, April 17, 1964

<sup>13</sup> Appointed, April 22, 1964

# STATEMENT OF APPROPRIATIONS AND EXPENDITURES

for the Period July 1, 1963–June 30, 1964

## Appropriations

|  |                            |
|--|----------------------------|
| Attorney General's Salary . . . . .                      | \$ 20,000.00               |
| Administration, Personal Services and Expenses . . . . . | 581,182.00                 |
| Veterans' Legal Assistance . . . . .                     | 18,602.00                  |
| Claims, Damages by State Owned Cars . . . . .            | 100,000.00                 |
| Moral Claims . . . . .                                   | 8,000.00                   |
| Capital Outlay Program, Equipment . . . . .              | 12,508.70                  |
| Total . . . . .  | <u><u>\$740,292.70</u></u> |

## Expenditures

|  |                            |
|--|----------------------------|
| Attorney General's Salary . . . . .                      | \$ 20,000.00               |
| Administration, Personal Services and Expenses . . . . . | 560,553.02                 |
| Veterans' Legal Assistance . . . . .                     | 17,595.70                  |
| Claims, Damages by State Owned Cars . . . . .            | 99,995.19                  |
| Moral Claims . . . . .                                   | 8,000.00                   |
| Capital Outlay Program, Equipment . . . . .              | 6,709.19                   |
| Total . . . . .  | <u><u>\$712,853.10</u></u> |

Financial statement verified (under requirements of C. 7, S 19 GL), January 18, 1965.

By JOSEPH T. O'SHEA,  
For the Comptroller

Approved for publishing.

JOSEPH ALECKS,  
Comptroller



# The Commonwealth of Massachusetts

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DEPARTMENT OF THE ATTORNEY GENERAL  
Boston, December 7, 1964

*To the Honorable Senate and House of Representatives:*

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1964, totaling 30,115, are tabulated as follows:

|   |        |
|---|--------|
| Extradition and interstate rendition . . . . .  | 113    |
| Land Court petitions . . . . .  | 225    |
| Land Damage cases arising from the taking of land:  |        |
| Department of Public Works . . . . .  | 2,387  |
| Metropolitan District Commission . . . . .  | 105    |
| Civil Defense . . . . .   | 1      |
| Department of Natural Resources . . . . .   | 48     |
| Department of Public Safety . . . . .   | 1      |
| Department of Public Utilities . . . . .  | 2      |
| Government Center Commission . . . . .  | 39     |
| Lowell Technological Institute . . . . .  | 1      |
| Massachusetts Maritime Academy . . . . .  | 1      |
| Massachusetts Turnpike Authority . . . . .  | 2      |
| Salem Teachers College . . . . .  | 1      |
| Southeast Massachusetts Technological Institute . . . . .                                       | 5      |
| State Reclamation Board . . . . .   | 1      |
| Town of Tewksbury Water Commissioners Board . . . . .   | 1      |
| County Commissioners, Worcester . . . . .   | 1      |
| University of Massachusetts . . . . .   | 3      |
| Miscellaneous cases, including suits for the collection of money due the Commonwealth . . . . . | 16,121 |
| Estates involving application of funds given to public charities . . . . .                      | 2,100  |
| Settlement of cases for support of persons in State institutions . . . . .                      | 558    |
| Small Claims against the Commonwealth . . . . .   | 338    |
| Workmen's compensation cases, first reports . . . . .   | 6,371  |
| Cases in behalf of Division of Employment Security . . . . .                                    | 720    |
| Cases in behalf of Veterans' Division . . . . .   | 970    |

## Introduction

My second Annual Report as Attorney General of the Commonwealth of Massachusetts, as required by General Laws, Chapter 30, Section 32, encompasses the fiscal year from July 1, 1963, to June 30, 1964.

The reorganization of the Department of the Attorney General into twelve divisions together with an outline of the responsibilities and functions of each Division are detailed in the 1963 Annual Report. Each Division has continued to handle efficiently and expeditiously all matters that have come before it.

The routing of all problems in one sphere to the appropriate section of the office has proved to be most beneficial. This procedure has enabled

the Assistant Attorneys General in each Division to develop an expertise in dealing with the matters before them, as similar and related questions recur. Consequently, we have witnessed the development of a "law firm" staffed by experts in each area of state administration.

The workload of the Department is unprecedented in the history of the Commonwealth. Dedicated and diligent service to the citizens has been possible only because the members of this office are constant and unswerving in their devotion to their responsibilities. Public service at its very finest has characterized the attitude of the men and women who have served the Commonwealth in the Department of the Attorney General.

In addition to the day-by-day problems occupying the time of the staff, each Division has suggested and drafted legislation in an attempt to correct and improve existing law. This Department has proposed and worked for the passage of remedial legislation which closed loopholes in our laws. These changes have greatly strengthened the framework of government and have promoted the orderly administration of justice in the Commonwealth. The bipartisan support given to many of these measures in and out of the Legislature exemplifies, I believe, a salutary change in the moral and political climate of Massachusetts.

The legislative program presented by this Department is included in the 1963 Annual Report. To date, the following bills proposed by this office have been enacted into law:

- |                                 |  |
|---------------------------------|--|
| Chapter 44 of the Acts of 1964  | An act penalizing the making of false written reports by public officers or employees.   |
| Chapter 449 of the Acts of 1964 | An act requiring public charities to file more detailed financial reports with the Division of Public Charities of the Department of the Attorney General.                 |
| Chapter 287 of the Acts of 1964 | An act clarifying the penalty which may be imposed upon persons violating certain provisions of the Conflict of Interest Law, so-called.                                   |
| Chapter 457 of the Acts of 1964 | An act relating to the appointment of taxes in certain eminent domain proceedings.   |
| Chapter 448 of the Acts of 1964 | An act relating to the recommendations of the Real Estate Review Board in the Department of Public Works in determining the value of certain land taken by eminent domain. |
| Chapter 579 of the Acts of 1964 | An act relating to proceedings for the taking of real estate and interests therein by eminent domain.  |

- Chapter 548 of the Acts of 1964    An act providing for the payment of interest on judgments against the Commonwealth and on settlements in eminent domain cases.
- Chapter 557 of the Acts of 1964    An act further regulating the issuance and contents of search warrants.
- Chapter 458 of the Acts of 1964    An act providing for the payment of witness fees to persons assisting the Attorney General in the investigation of crime.
- Chapter 193 of the Acts of 1964    An act relative to the calling of special town meeting by a justice of the peace in a town having a form of representative town meeting government.

As this is written, other bills are well on their way to becoming law; others have been defeated by the Legislature.

Those who serve in the Office of the Attorney General are in a unique position to appraise the basic soundness of the Massachusetts General Laws and how, in fact, the laws are implemented and administered. We have, I believe, a responsibility to put this knowledge to constructive use by presenting to the Legislature on a regular and sustained basis, remedial and pioneering legislation which would improve the fabric of Massachusetts government.

## Administrative Division

The responsibilities of the Administrative Division of the Department of the Attorney General are wide ranging: — fulfilling requests for opinions of law from constitutional officers and agency and department heads, appearing on the Commonwealth's behalf in civil court proceedings, advising the Governor on the constitutionality of pending legislation, combating anti-trust conspiracies, approving town by-laws.

In addition, the members of the Division are called upon to answer a host of legal questions which do not necessitate the drafting of formal opinions. The discussion of legal problems both in person and through correspondence with state officials and private citizens further requires the attention of this Division.

The establishment of the Administrative Division as a central clearing-house for all opinions issued by the Department is discussed in the Annual Report of 1963.

During our first full fiscal year in office, the demands upon the Office of the Attorney General for opinions has continued to increase. The value of the opinions of the Attorney General, as guides for present and future governmental and personal conduct, lies in their legal soundness. We have tried to combine painstaking and thorough research with skillful draftsmanship in preparing all opinions.

A recitation of a *partial* list of important opinions drafted by the Division this year will graphically demonstrate the scope and variety of the Division's responsibilities in the "opinion" phase of its work.

— An opinion was requested by several public officials regarding political advertising in program books, relative to the Corrupt Practices Act, G.L., c. 55. Although corporations cannot ordinarily make political contributions, the Attorney General ruled that corporations could buy advertisements in political program books as long as the corporations were receiving appropriate value for their purchase.

— The subject of which taxicabs had the right to operate at Logan Airport was called to the attention of this Division as the result of an inquiry by the Department of Public Safety. It was determined that the City of Boston could require that taxicabs operating at the Airport be licensed by the City. In litigation independently pursued, the opinion of the Attorney General has been sustained by the Supreme Judicial Court.

— Pursuant to an opinion prepared by this Division last year interpreting G.L., c. 30, § 59, the so-called "Perry Law", the Governor of the Commonwealth requested further definition of the rights of appointing authorities to suspend appointees indicted for misconduct in office. The Governor was advised that he might suspend the Commissioner of Public Safety pursuant to G.L., c. 30, § 59. However, he was further advised that the statute is inapplicable both to offenses by elected officials and to offenses bearing no relation to the office or position held by the indicted individual at the time the criminal acts in question allegedly were com-

mitted. The language and intent of the "Perry Law" has been extensively studied and researched so that the interpretations and definitions which the Opinions of the Attorney General have set forth would be instrumental in bringing the goals of the statute into proper focus.

— An important public policy question arose in regard to the effect of an absolute pardon upon individuals with criminal records who seek appointments to certain positions within the Department of Correction. The Commissioner of Correction sought an opinion from the Attorney General as to whether absolute pardons enable such persons to be appointed to positions involving personal and direct contact with prisoners. In an opinion drafted by the Administrative Division, the Attorney General ruled that when a full pardon is granted, commission of the crime cannot be a consideration in the appointment of a pardoned applicant to a position involving personal contact with prisoners.

— A matter that is becoming the subject of increasing public concern — eligibility of an individual for parole — was brought to the attention of this Division by an inquiry from the Chairman of the Massachusetts Parole Board. The propriety of the method employed by the Parole Board, under G.L., c. 127, § 133, to compute parole eligibility was at question. The practice of the Parole Board was first to reduce the prisoner's sentence by deducting from the minimum sentence good conduct credits calculated pursuant to G.L., c. 127, § 129 and then to declare the prisoner eligible for parole after two-thirds of such reduced minimum sentence had been served. The Opinion of this Department was that for purposes of parole, the good conduct deductions should be made from minimum sentences, and that the Parole Board was, therefore, properly administering G.L., c. 127, § 133.

— The controversial matter of the distribution of State aid for education to the cities and towns, authorized by c. 70 of the General Laws, was subjected to study by this Division at the request of the Commissioner of Education. The issue revolved around the new apportionment of state and county taxes by the General Court, (c. 660 of the Acts of 1963), which was designed to supersede the apportionment of such taxes established pursuant to c. 559 of the Acts of 1945. The opinion declared that the valuations specified in the 1963 statute were not to take effect before 1965 for all purposes, including that of determining State aid amounts, and that, consequently, the Department of Education should proceed on the basis of present law, and should prepare the forms for State aid in accordance with the valuations appearing in c. 559 of the Acts of 1945.

— The Commissioner of Administration and Finance requested an opinion of this office on an extremely technical matter concerning the new Executive Office for Administration and Finance, created by Chapter 757 of the Acts of 1962. Close scrutiny of the statutes relative to the offices of both the former Commission of Administration and Finance and the new Executive Office for Administration and Finance, as well as of the provisions regarding transfer of personnel between the two offices, led to the conclusion that the position of Director of Personnel and Stand-

ardization existed in the new structure, but that there had been no provision for transfer of the individual holding the position in the former structure to the new organization.

— The Conflict of Interest Law, (G.L., c. 268A), which became effective May 1, 1963, has required continual and minute analysis and interpretation by members of the Division. During the period of this report, 136 Conflict of Interest Opinions have been issued to State employees regarding their status under the Law. In addition, informal opinions have been rendered to, and conferences held with, members of State agencies, city solicitors, town counsels, and municipal officials relative to the effect of this statute. The Division has also sent to the 351 cities and towns in the Commonwealth interpretive memoranda to aid local officials in understanding and administering the Act and has continued its extensive public education program (via news media and personal appearances) to familiarize citizens with the provisions and purposes of the Act. Furthermore, a statistical survey of the classification of municipal employees and the operation of the statute throughout the State was compiled by this Division from information about the operation of the statute from every city and town. This data provides an up-to-date and comprehensive guide about the actual effect of the law, its application and how it is being implemented and interpreted. This information will prove to be invaluable to the Legislature as it reviews the effectiveness of the law. The data will help in the drafting of amendments which will make an excellent statute even more effective.

The Administrative Division handles all civil litigation which affects the constitutional officers or that is "extraordinary" in nature, and is also responsible for much of the litigation work involving state agencies and departments. The most notable increase in the workload of this Division during the past year has been in this area. Among the matters handled in court by members of the Division were cases involving daily Bible-reading in the public schools; the legislative pay-raise; the protection of marine fisheries; the book *Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill*); and the disposition of some works of art owned by the Commonwealth.

After the Supreme Court had declared compulsory Bible-reading in public schools to be unlawful, the Commissioner of Education requested an opinion regarding the practice of daily reading of the Bible in our public schools, pursuant to the Massachusetts statute. The Attorney General replied that our statute was indistinguishable from the Pennsylvania statute which the United States Supreme Court had invalidated, and that therefore our statute was likewise unconstitutional. Nevertheless, the School Committee of North Brookfield insisted upon the continuation of the practice of daily reading of the Bible in its public schools. For some months, the Attorney General and the Commissioner of Education engaged in an extensive dialogue with the Town Counsel and members of the North Brookfield School Committee, and repeatedly conferred with them in attempts to achieve compliance with the law. These attempts failed.

The Attorney General continued to set forth clearly and unmistakably the obligation of the School Committee to comply with the supreme law of the land. Still, the Committee refused to comply. To seek uniform compliance with the law, this Division, acting on behalf of the Department of the Attorney General, filed a petition with the Supreme Judicial Court for a writ of mandamus to order the Committee to discharge its duties according to the Constitution. In *Attorney General vs. The School Committee of North Brookfield*, a single Justice of the Supreme Judicial Court issued the writ, instructing the School Committee to comply with the law. The case was appealed to the Full Bench of the Supreme Judicial Court, which has recently upheld the action of the Single Justice. It is important to note that the point at issue is not the merit of school prayer, but, rather, the effect of a U. S. Supreme Court decision upon a State statute in conflict with the decision.

The State Ballot Law Commission declared invalid a substantial number of the signatures gathered for the purpose of placing upon the ballot a referendum to repeal the statute granting the legislative pay raise. Accordingly, the question could not be voted upon by the public. In *Molesworth v. the State Ballot Law Commission*, this office represented the State Commission in the Superior Court. The Superior Court Justice has reported the case to the Supreme Judicial Court. A hearing is awaited.

Other litigation of a sensitive and unusual nature in which this Division has been involved includes a case regarding the protection of marine fisheries arising from a suit brought by the Department of Natural Resources against a contractor. The Director of Marine Fisheries had imposed conditions prohibiting the filling of a salt water marsh in the Town of Wareham. The case was argued in the Superior Court and judgment was rendered for the Department of Natural Resources. An appeal is now pending before the Supreme Judicial Court.

Of most recent note has been the institution of a *suit in rem*, at the request of the Commission Against Obscene Literature, pursuant to the agreement between the Attorney General and the District Attorneys, (described in detail in the 1963 Annual Report), against John Cleland's *Memoirs of a Woman of Pleasure* (commonly known as Fanny Hill), in order to determine whether the book is obscene. This matter has been argued in Superior Court and the decision of the trial justice is awaited.

An equitable replevin suit has been brought against the Chairman of the House Ways and Means Committee on behalf of the State Art Commission to recover, for the Commission, art treasures owned by the Commonwealth. This case has not yet been brought to trial.

The cases cited above are examples of the extraordinary matters which have been handled by the members of the Division. Much of the everyday work lies in counselling, advising and representing in court the numerous boards, commissions and agencies of the Commonwealth. Members of the Division have spent many hours counselling the Board of Registration of Architects relative to the preparation of new regulations. The Board of Registration of Plumbers has also asked for and received a considerable amount of counsel and advice.

It is the Civil Service Commission, however, which has the greatest need for the Division's Services. Division members render constant legal advice and nearly daily representation in the Courts of the Commonwealth on behalf of this Commission.

Efforts have been made to urge our State boards to adopt the necessary regulations and to conform to the Administrative Procedure Act (G.L., c. 30A) in an attempt to streamline their operations.

Prior to signing enacted legislation into law, in certain cases, the Governor forwards the proposed measure to the Attorney General for his opinion relative to its form and constitutionality. It is the responsibility of this Division to consider such pending legislation in detail. Particularly during the latter part of this fiscal year, the number of legislative proposals awaiting enactment sent to this Department has been very heavy.

Anti-trust work is extremely involved and complex but it is necessary and vitally important. A great deal of work is necessary in the preparation of briefs and arguments in court in prosecution of these cases. As a result of the extensive research and action undertaken by members of this Division, approximately \$350,000 has been collected for the Commonwealth from overcharges and price-fixing by national utilities and industries. This money is being refunded to the cities and towns within the State.

Under the mandate of G.L., c. 40, § 32, which requires that town by-laws be approved by the Attorney General before they become effective this Division has continued to perform this important function. Advice and guidance on a host of municipal problems are also provided to city and town officials by the Assistant Attorney General who is assigned to this responsibility on a full time basis.

### Civil Rights Division

Some of the areas in which the Civil Rights Division has made contributions are discussed below.

Following the United States Supreme Court decisions in the companion cases of *Schempp v. The School Committee of Abington Township and Murray v. Curlett*, decided in June, 1963, which decisions held that Bible reading in the public schools was unconstitutional under the First and Fourteenth Amendments, the Attorney General rendered two opinions explaining the decision. In response to the Secretary of the Boston School Committee, the Attorney General ruled that the Constitutional principle expounded by the United States Supreme Court did in fact apply to Massachusetts despite the fact that Massachusetts had not been a party before the Court. (The testing of this ruling in the Courts of the Commonwealth is discussed in the Administrative Division section of this report).

A little more than a month later, the Attorney General sent to the Commissioner of Education the opinion which has come to be known as "The School Prayer Ruling" and which has received national recog-



dition. In this opinion, a series of questions were answered explaining the effect of the United States Supreme Court decisions and establishing guides as to what activities could and could not be carried on in the public schools. This was the first attempt by a State Attorney General to interpret and explain on a practical day-by-day basis, the mandate of the United States Supreme Court.

In another area relative to the first amendment, the Department answered a request of the Commissioner of Public Safety regarding the licensing powers of municipalities. The opinion declared that the Mayor or Selectmen did not have the power to suspend or revoke the license of a motion picture theatre operator for having shown a motion picture which was considered "objectionable," so long as no actual statute or other law had been violated. Expanding on this theme later, the Attorney General, in a letter to the House Ways and Means Committee, articulated the principal opposition to a newspaper censorship bill. The bill, which proposed to set up a censor within the Attorney General's Office to review for accuracy newspaper reports of criminal trials, was finally defeated.

A bitter dispute raged during the past year over alleged de facto segregation in Boston's schools. Throughout the year, this office has sought to apply the principles of law involved in this dispute in a nonpartisan, fair and legally correct manner. The Attorney General, in an opinion requested by the Commissioner of Education, ruled that a proposed school boycott scheduled for February 26, 1964, was illegal, because it violated statutes of the Commonwealth which provided that children were to be in school at a given time.

Relative to this same dispute, the Boston School Committee rejected a joint request by the Attorney General and the Commissioner of Education that the dispute be mediated by the former officials. The dispute between the parties then became polarized. The struggle continues and is being waged in the political arena.

Nonetheless this Division continued to examine the problem in the light of the applicable statutes, and concluded that the problem had not adequately been defined. The Commissioner of Education submitted to the Attorney General the question of the legality of a "race census," an investigation to obtain information concerning the race of all students attending certain grades in the Massachusetts public school system. The Attorney General affirmed the legality of such a census. This opinion paved the way for the Commissioner's so-called "Blue Ribbon" study, the first high level, professional study of the problem undertaken by any agency of the Commonwealth. The City of New Bedford contested the validity of the Attorney General's opinion and took the matter to court. An opinion of the Superior Court is awaited.

Relative to the extension of the Fair Housing Laws:

After chapter 197, § 2 of the Acts of 1963 had been enacted into law — discussed in the previous Annual Report — a group of Massachusetts citizens felt that the new bill was a radical departure from prior Massa-

chusetts law and prevented a householder from establishing preferences in the leasing of a part of his house in "family" type situation. A test case was therefore brought.

In addition, legislation was proposed which sought to correct the imagined problem. The amendment was studied by the Civil Liberties Division and the Attorney General. We were convinced that the bill's enactment would have reinstated the unfortunate situation which Ch. 197 of the Acts of 1963 was designed to correct.

An opinion of the Division was solicited in connection with the test case. The Division once more painstakingly analyzed the history and structure of the law. The Attorney General concluded that the fears of those who had instituted the test case and drafted the amendment which the Legislature was considering were without foundation; that, in fact, the existing law was not a radical departure from established principle; and that the proposed bill was both unnecessary and unwise.

The test case was resolved. The Attorney General's analysis was presented to the legislative leaders; and the bill was defeated.

The opinion that stopped the Registry "roadwatch" on the grounds that it was an invasion of citizen privacy was discussed in the 1963 Annual Report. Recently, another problem involving the liberty of citizens arose. The political course would have been to ignore the principles expressed in the roadwatch opinion. However, the Department declined such a course and submitted a brief, as *amicus curiae*, in *Commonwealth v. Lehan*, a case in which the Supreme Judicial Court affirmed the principles of citizen privacy and radically altered forty years of practice whereby police believed themselves able to impose restrictions on the liberty of motion of citizens beyond that allowable by law.

The Civil Rights Division represents the Massachusetts Commission Against Discrimination, an administrative agency established to enforce our Fair Practices Law. The draft agreement, (discussed in the 1963 Annual Report) prepared by this Division for use in a stalemated case which asserted that there was illegal segregation in Boston Public Housing, proved to be the basis for fruitful negotiation and ultimately, the foundation for a signed agreement between the parties involved. It is significant that in the summer of 1963, amidst all the rancor and frustration engendered by problems of intergroup relationships in Boston, this one racial problem was being solved by discussion and negotiation. In this effort, the Attorney General's role was significant.

"The criminal is to go free because the constable has blundered" (Cardozo, J., in *People v. Defore*, 242 N.Y. 13, 21), is a concept which both citizen and policeman find difficult to comprehend. Yet the possibility of widespread acquittals due to unlawful arrests has become a very real problem. One solution is to attempt to define better this confused area of law, as was done in the "roadwatch" opinion and in the presentation of two briefs in the above-mentioned *Lehan* case before the Supreme Judicial Court. The obvious other approach is to attempt to better instruct the "constable." This Division established the practice of lecturing each State

Police Class at Framingham on the law of search and seizure. Further, when the *Lehan* case was decided, the office sent a copy of it to every police chief in the Commonwealth, together with a brief summary of its content and meaning. Early in his term of office, in a memorandum to all police chiefs, the Attorney General laid to rest the confusion surrounding the rights of police to eavesdrop on prisoners' conversations. This action safeguarded prisoners' rights to talk freely to counsel.

The Attorney General has sought to impress upon all police chiefs the importance of, and to obviate the dangers of incapacity to prove, compliance with the telephone statute, as has already been mentioned. In a further effort to clarify the rights of prisoners, in September, 1964, this office sent to all police chiefs a reminder of statutory rights of prisoners to the use of a telephone. The Attorney General noted the likelihood that failure to comply with the statute may impede the trial of the case, and recommended a form (reprinted below) which would minimize the number of false claims of violations by disgruntled prisoners. The action by the Attorney General turned out to be farsighted and necessary. For, some eight months later, the Massachusetts Supreme Judicial Court ruled that evidence obtained from a witness who had not been informed of his rights to use a telephone would not be admissible in court.

Still another approach was adopted in the effort to remove cages from some of the criminal courtrooms in our Commonwealth. For several years, bills to abolish such relics were presented to the Legislature, amidst much publicity. These bills never passed. The Attorney General, therefore, sought the opinion of several of the most experienced Superior Court trial judges on the benefits and detriments of cages. Using the information so obtained, he quietly but persuasively, put the case for abolition to several key legislators. Result: the bill to abolish cages was, this year, enacted into law.

The emphasis by the Attorney General on non-partisan legal professionalism in these matters is important. The Prayer Reading and Boycott opinions — the most widely publicized civil right decisions made this year were issued amidst a storm of controversy. But it is hoped that they have engendered respect for the law. For the law applies to the strong and to the weak — to the majority, but also to the minorities. Perhaps the Attorney General's insistence that sex deviates be accorded the due process of law which our statutes provide for them is not "popular." Perhaps his decision that the inmates of the state farms not be deprived of their access to legal counsel were not decisions which engendered great popular approval. But such decisions must be based on the law and not on the ebb and flow of public approval or disapproval.

## Prisoner's Right to the Telephone

Station No.

Prisoner:

Date:

Time of arrival:

Forthwith upon arrival of the above-named prisoner, I informed him of his rights to the use of a telephone at his own expense, to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney; and I permitted such use within an hour therefrom. Said prisoner (did not) use the telephone (at about .....).

(did)

time

The above statement is correct.

.....  
Official in charge

.....  
Prisoner (or witness, if prisoner  
refuses to sign)

*Remarks:* Whenever the above is not signed by both the official in charge and the prisoner, the attendant facts and reasons therefor (such as that the prisoner was unconscious, refused to sign, or the like) must be set forth; and pertinent facts should in all events be set forth here.

.....  
Official in charge

The above facts are correct.

.....  
Witness

Most significantly, the opinions, agreements, legislative arguments, judicial appearances of this office, are all matters of public record. This office does not give unofficial or casual advice. Its record is set forth in print for all to see and it is hoped that it will be subject to scrutiny of critics both present and future.

## Contracts Division

The Contracts Division examines all state contracts and leases for propriety of legal form. It represents the Commonwealth in all civil actions brought by or against it as the result of such contracts and leases. In addition, the Division conducts conferences, engages in legal research, and prepares briefs, memoranda, and opinions in conjunction with contracts problems presented to the Attorney General.

The influx of the Commonwealth's leases and contracts is voluminous. Each such instrument must be carefully, competently and expeditiously handled in order to permit the Commonwealth's business to proceed uninterruptedly. During the fiscal year members of the Division reviewed and approved approximately 1,500 contracts for the state departments and agencies of Massachusetts.

In order to forestall later litigation from developing, the Division has, when requested to do so, continuously given advice and guidance to various state departments to aid them in the preparation, drafts and proper execution of contracts and leases affecting their departments. Moreover, the Division has investigated the background, researched the appropriate statutes, and subsequently rendered advice regarding competitive bidding procedures to some twenty state agencies.

The Contracts Division staff has compiled a series of inter-office legal memoranda with detailed analyses on questions related to public works construction and other relevant contracts subjects, thereby providing background continuity for the Department in these areas of the law.

Attorneys in this Division have scheduled, attended, directed and moderated more than seventy-five major conferences between contractors and various state and federal agencies. The conduct of these conferences required familiarity with public works construction laws, and a knowledge and thorough understanding of the detailed background of a host of complex and individual situations.

Members of the Division have been called upon from time to time to research and draft numerous opinions and memoranda, and to give technical advice in response to inquiries submitted to the Division.

Some of the more significant topics covered were:

1. Revision of the Metropolitan Transportation Authority's Inter-Agency Indemnity Agreement as to qualification of contracting firms applying for state contracts;
2. Release of tax liens for the Metropolitan District Commission;
3. Motorboat regulations and the problems related to their operation under G.L., c. 90B (Ter. Ed.);
4. Effect of interpleader statute in contract situations involving the Commonwealth;
5. Effect of changes in specifications made by an engineer;
6. Delays and their effect in construction contracts;
7. Effect of "quantum meruit" actions against the Commonwealth.

Another important function of the Contracts Division is the determination of whether state departments may make direct payments to subcontractors having claims against funds retained by the Commonwealth under General Laws (Ter. Ed.) c. 30, § 39F, and the issuance of written authorizations or disapprovals in connection with such claims. In the course of the year some 150 of these determinations were made and issued.

The Division also has been consulted for advice and examination of state leases. Much of the increased activity in this area is due to matters relating to the Board of Regional Community Colleges.

Litigation activity in the Contracts Division has been heavy, requiring that three of the five attorneys devote substantially all of their time to trial work.

Many cases against the Commonwealth were pending when this administration came into office in January of 1963; in addition, numerous cases brought by sub-contractors against the general contractor with the Commonwealth joined as a co-defendant were awaiting final decision. These lien cases all required the drafting, filing, and argument of demurrers or motions to dismiss in order to obtain dismissal of the Commonwealth from the actions; however, in many instances appearances and arguments in the Commonwealth's behalf were required at the trial.

The Division received and prepared appropriate pleadings in approximately thirty-five cases which were forwarded to outlying counties for attention. In over one-half of these cases, resident counsel obtained favorable decrees by using the initial pleadings submitted.

Members of the Division conducted the successful appeal of several cases in the Supreme Judicial Court. One case brought by an aviation company against the Commonwealth and the Massachusetts Port Authority, in which there had been an adverse finding against the Commonwealth and the Port Authority by a Superior Court justice, was appealed to the highest court during this period. The Supreme Judicial Court's findings was favorable saving the Commonwealth \$11,000 and the Port Authority, \$32,000.

Of the approximately two-hundred cases active during the year, the Division has achieved favorable final dismissal of the Commonwealth in approximately one-hundred-twenty cases by special pleadings. Preparation for these cases necessitated conferences, drafting of pleadings, writing of briefs in support of motions, and oral arguments by the trial attorneys.

Trial attorneys were engaged in hearings and trials before auditors, masters and justices of the Superior Court. The length of trials varied from one or two days in relatively simple matters to over eight months in more complicated ones. Two extended trials were conducted by the staff (both for the Metropolitan District Commission) in the field of tunnel construction. The principal issues in these two cases concerned quantities and rock formation difficulties encountered during the course of the work.

Another major litigation area in which the Division participated involved the liability of the Commonwealth for restoration of premises leased by it at the termination of the leasehold period.

The staff is, of course, constantly engaged in preliminary research on pending cases which will be scheduled for trial in the ensuing six months.

In summary, the efforts of the Division have been successfully directed towards maintaining current status both in its non-trial functions and in litigation. We have continued to implement the Attorney General's "no-settlement" (See last year's report of the Attorney General) policy in treating disputed claims arising from contracts between private companies and state departments and agencies.

## Criminal Division

In accordance with the designation of the Attorney General as the chief law enforcement officer of the Commonwealth, the Criminal Division has continued its vigorous prosecution of crime and corruption in Massachusetts.

### *Boston Under-Common Garage Cases*

The circumstances and results of the first Boston Under-Common Garage Case are discussed in the Annual Report of 1963. In the second garage trial, one of the defendants from the first trial and two other individuals were charged with conspiracy and larceny of \$344,468 from the Massachusetts Parking Authority during construction of the facility. Two of the defendants were found guilty and sentenced to terms of from five to five and one-half years in prison. The third individual was acquitted.

The key to the convictions in these garage trials was spectacular police work and remarkably thorough preparation by the personnel assigned to the case. The efforts of these men brought to light scientific evidence establishing falsification of documents. In the extensive preliminary work for, and in the conduct of the two trials of this Under-Common Garage case, a turning point in the moral climate of the Commonwealth was reached. The principle that no one is beyond the law was reaffirmed. Those in the community who were seeking the return of the rule of law in government were given hope.

Appeals have been taken in both these cases. The preparation of the voluminous record has caused a long delay in the hearing of the appeals by the Supreme Judicial Court. The first appeal was heard on May 13, 1964, and has not yet been decided. The second appeal will probably be heard at the October sitting of the Court.

### *Raceway Investigation — Hampden County*

The investigation into racing in Massachusetts, particularly relative to the stock of Hancock Raceway, Inc., in Hampden County was discussed in last year's Annual Report. Three men were indicted for larceny and accessory before the fact to larceny. In the trials that followed in January and February of 1964, both a former racing commissioner and a participant in the Hancock Raceway manipulations were convicted for larceny. Investigation of the financing of "Berkshire Downs" in 1964 is under continuing investigation.

### *Contract-Swapping Conspiracy*

This conspiracy involving the Division of Waterways, also detailed in the 1963 Report, is still pending on appeal. The delay was due to the inability of the court stenographer to produce a transcript until a year after the trial, and additional delays caused by dispute over the accuracy of the transcript.

### *Building Inspector Cases*

Initial investigation in this series of cases was undertaken by the previous administration. To date, two of the building inspectors have been

brought to trial and acquitted. The remaining four men have not yet been tried.

### *Health Inspectors Case*

In February of 1964 it came to the attention of the Division that a group of men, by falsely representing themselves as state health inspectors, were soliciting advertising for a book containing sanitation codes. This Division, after investigation, secured complaints and conviction of three men in the Middlesex Superior Court in June of 1964.

Each of these cases, plus many others which, for one reason or another, never reach the prosecution stage, require intense research, investigation, and preparation of materials by competent Assistant Attorneys General and police officers. The description of the indictment and prosecution may take but a few sentences on this page, but the work involved often consumes the better part of a year.

The Criminal Division has continued to represent the Commonwealth in extraordinary writs [writs of error, writs of habeas corpus and mandamus actions] and has expended a great deal of time in the preparation and presentation of pleadings and briefs and argument before the Courts of the Commonwealth. These extraordinary writs have required one Assistant Attorney General to be in court virtually continuously. Recent decisions of the United States Supreme Court have generated a flood of petitions from prisoners seeking release because of alleged failure of constitutional safeguards in their trials. This is work requiring the highest degree of constitutional scholarship and the Assistant Attorney General assigned to this area has had notable success.

It is the responsibility of the Criminal Division of the Department of the Attorney General to work closely with the Massachusetts Crime Commission in its efforts to gather and present evidence of corruption in state government. In fact, the main work of the Division has been the review, preparation and presentation of evidence initially developed by the Crime Commission. This work has necessitated assessment of the evidence as to sufficiency; additional investigation where possible and necessary; selection of proceeding to be brought; presentation to a grand jury where the evidence warranted; and preparation of indictments for the grand jury on the basis of this evidence. These efforts have been undertaken in close cooperation with Crime Commission personnel. In this cooperative effort, the office of the Attorney General has been careful to preserve the necessary constitutional distinction between the legislative and executive functions.

To date, Crime Commission cases concerning thirteen major areas of corruption have been presented. These cases have resulted in 164 indictments involving forty individuals and ten corporations. Of these, 134 indictments relate to corruption in the small loan industry, and name as defendants four present and former public officials, nine corporations and seventeen officials of small loan companies. The large majority of these indictments relate to multiple instances of alleged conspiracy, larceny and bribery.



In January of this year, at the request of the Attorney General, a special grand jury was convened in Suffolk County for the first time in twenty-five years. The jury, which is hearing principally Crime Commission evidence, has been sitting in virtually continuous session since January. On evidence presented by the Massachusetts Crime Commission and the Attorney General, this grand jury, on May 8, 1964, handed down the most extensive series of indictments ever returned in this Commonwealth — 137 of the 164 indictments mentioned above were returned at this time. The 137 indictments contained 217 counts against twenty-six individuals and ten corporations. High-ranking public officials were included in this list. Arraignments of these cases are incomplete and special pleadings are still being filed.

The trial of the cases resulting from these indictments has been delayed by the vast number of special pleadings which have been filed by counsel for the defendants. Some of these pleadings have raised ingenious and novel questions of law. For instance, one case went to the Supreme Judicial Court twice on reports of preliminary matters before trial. This is unique in the history of criminal cases in the Commonwealth. Thereafter, one of the defendants discharged counsel and engaged new counsel, causing further delay in bringing the case to trial. Of all the indictments returned, two cases have gone to trial to date. In the first, the defendant was acquitted. In the second, three defendants were convicted, which convictions are currently on appeal.

The Complaint Section of this Division, the establishment of which is explained in the 1963 Annual Report has continued to operate as a forum, where in confidence, any citizen may present complaints or evidence about violations of Massachusetts law. The Section has processed 2,610 complaints since its inception in January, 1963. These complaints have all been handled expeditiously. When necessary, they have been referred to the State Police for eventual disposition. Other cases have been brought to the attention of the Boston Police, and have resulted in numerous arrests.

A cemetery lot fraud which was reported by a citizen to the Complaint Section was turned over to the Middlesex County District Attorney's office and resulted in the exposure of the fraud and the final conviction of the guilty persons.

To coordinate state and local law enforcement, the Attorney General has held meetings with the local police chiefs, sheriffs, district attorneys and the Commissioner of Public Safety. The Attorney General established a Crime Council to make more effective the detection and prosecution of crime and corruption. The efforts of the Council are being directed to specific means of improving law enforcement, such as the investigative functions of District Attorneys and the use of search warrants.

In regard to the committee established a year ago to undertake statistical research, this Division has attempted to coordinate and upgrade the level of statistical crime reporting in the Commonwealth. Criminal statistical reporting is of two kinds: the reporting of criminal occurrences, which is the basis of most official crime reports; and the reporting of information

relative to the individual criminal. It is our belief that the second form of reporting is the more significant, and offers more hope to the law enforcement officer and the social scientist in discovering the sources of criminal impulses and of crime prevention. Much well-documented learning is available on this subject, and there already exists in the Commonwealth administrative machinery to process it. Effort is needed to develop a system for processing significant facts, correlating them, and making them available to the proper authorities. The small advisory committee, the membership of which is enumerated in the 1963 Annual Report, has now been expanded to include representatives of the agencies principally concerned, namely, the Board of Probation, Department of Correction, Youth Service Board, and the record bureau of the State Police. Among the aims of this group is the establishment of an electronic data processing system to record and correlate the information. The committee is working with the Commissioner of Administration and Finance to accomplish this.

This Division was also responsible for the drafting of a substantial portion of the Attorney General's legislative program. Working closely with the existing criminal law and practice, members of the Division noted areas in which improvements in the statutes would aid the process of efficient and equitable law enforcement. After many months of research and study, proposals were formulated. Among the bills passed by the Legislature this year which were products of this Division's work: — a bill which penalized the making of false written reports by public officers or employees; a bill which regulated the issuance and contents of search warrants; a bill which provided for the payment of witness fees to persons assisting the Attorney General in the investigation of a crime. The passage of these measures represents a distinct improvement in the Massachusetts criminal law.

### Eminent Domain Division

The Eminent Domain Division is concerned with problems arising from the taking of private property for a public purpose. If property is taken by the sovereign power of eminent domain the owner must be compensated in a fair and reasonable amount.

The taking agency and the former owner attempt to agree on the fair value of the property. When agreement is not reached the owner may petition the Superior Court to assess damages under Chapter 79 of the General Laws. It is the responsibility of this Division to represent the Commonwealth in such litigation.

The Division has continued to work to assure that all those from whom property is taken are compensated promptly and equitably. Administration of the policy of complete preparation for trial in every pending case at the earliest possible date has been expanded and refined. Further progress has been made in reducing the number of Chapter 79 petitions pending in the Superior Courts of the Commonwealth. In January, 1963, approximately 1,800 such cases had accumulated. In the following sixteen

months 600 new cases were filed making a total of 2,400 cases to be considered. During the same period approximately 1,600 petitions have been disposed of, leaving 800 cases pending. Trial and settlement of land-taking cases is therefore now on a current status in this Department.

The average number of cases closed per month has been about 100. In comparison the previous average monthly rate had been thirty-five cases. This accomplishment represents a record of practical public service to the citizens of the Commonwealth. Individual property owners are now paid far more promptly. All citizens benefit from the substantial savings which have been achieved in the cost of land acquisitions for public improvements.

The Division continued to request special sessions of the Superior Court as a part of the program to reduce this backlog. The Chief Justice of the Superior Court approved nine special sessions in three counties in July, 1963 for the sole purpose of hearing land-damage cases. In that month 267 cases were settled or tried in Bristol, Norfolk and Middlesex [Lowell] Counties.

Herewith are two examples of the types of cases in which the Division becomes involved and the success which the Division has achieved: — One concerned a granite quarry. The second found this Department representing a petitioner — the Armory Commission.

In the quarry case alone, the Commonwealth saved perhaps four million dollars plus interest. The petitioner sought damages of \$4,500,000. The Commonwealth claimed that the damages amounted to only \$50,000. After a four week trial the jury returned an award of \$50,000.

The Commonwealth was the petitioner against the Massachusetts Turnpike Authority as a result of the taking of the Irvington Street Armory for the Turnpike Extension into Boston. The Massachusetts Turnpike Authority offered the Commonwealth \$240,000. A three week trial resulted in a verdict of \$895,000 for the Commonwealth. Accumulated interest brought that liability to more than a million dollars.

In accordance with a directive of the Attorney General the Division reviewed in depth the procedures governing the use of the power of eminent domain. No such in depth study had been undertaken for fifty years. From it came the opinion of December 27, 1963 [see page 000 of current report] on the illegality of token, \$1.00 awards when property was taken by eminent domain and recommendations for legislation. Prepared for the first time by the staff of an Attorney General are the legislative proposals revising extensively the existing law as embodied in Chapter 79 of the General Laws. The proposed legislation required the taking authority at the time it adopts an order of taking to vote a realistic award based on an appraisal of damages arising from the taking of property and to state in the notice of taking a definite time limit within which it must pay the landowner, either within sixty days after the taking or fifteen days after the property owner asks for the award. Most important, the individual property owner on November 1, 1964 will have the right to petition for a writ of mandamus if the taking authority does not obey the new law and to ask for damages caused by any payment delay. So for

the first time in Massachusetts history the individual citizen has an effective remedy when he or she is not given the fair and prompt treatment which the statute mandates.

The legislation further provides for computation of the apportionment of real estate taxes in a land-taking procedure by a trial judge. Detailed written statements of reasons for appraisals of damages by the Review Board of the Department of Public Works are now required. Beginning January 1, 1965, payment of interest on judgments or settlements, in addition to interest on damages to the taken property, will be required by law as with all other judgments of the Superior Court. Attached hereto is a summary comparison of the old and new provisions.

Members of this Division are continuing the work of codification of all highway laws of the Commonwealth. Present schedules include presentation of a comprehensive new code to the 1966 Session of the General Court for enactment into law.

The financial savings to the Commonwealth as a result of the work of this Division are considerable. The interest payments which are saved due to the rapid disposition of cases amounts to hundreds of thousands of dollars. The return of more favorable verdicts due to new and more thorough procedures for preparation of all cases has saved the Commonwealth incalculable sums. For example, in 1963 alone, approximately \$13,000,000 was saved by these methods of preparation and trial. That is to say, settlements and court verdicts were \$13,000,000 less than amounts claimed by former owners.

The greatest saving to the Commonwealth, however, will result from the legislative program enacted in 1964. Prompt payment of damages from future land takings will substantially reduce the interest expenses of the Commonwealth. They should also eliminate a significant number of lawsuits previously considered necessary by property owners who could not obtain their money when it was sorely needed. Reduction of this time-consuming litigation will also help to clear some of the congestion on the civil side of the Superior Courts of the Commonwealth.

# COMMONWEALTH OF MASSACHUSETTS — DEPARTMENT OF THE ATTORNEY GENERAL

## ANALYSIS OF CHAPTER 79 AS AMENDED BY CHAPTERS 448, 457, 548, 579 and 633 ACTS OF 1964

| Reference   | Statute as Amended   | Law prior to Amendments   | Purposes of Amendments  |
|---|--|---|---|
| Sec. 8B of Chapter 79<br>G. L.<br>Chapter 633,<br>Acts of 1964                      | Provides 4-month period of grace to owner-occupant of property before he must vacate premises.<br>Effective November 1, 1964.  | No comparable provision except in some special acts relating to state highways.   | Uniformity of treatment of owners regardless of purpose of taking an opportunity for all owners to make arrangements for new quarters.  |
| Sec. 10A of Chapter 79<br>G. L.<br>Sec. 5 of Chapter 579,<br>Acts of 1964           | Former owner may obtain writ of mandamus against appropriate public officials to enforce compliance with Sections 6, 7, 7A, 7B, 7C, 7D, 8A, 9, 10 and 36A of Chapter 79 G. L. If damaged by such noncompliance he may also recover such damages from taking agency.<br>Effective November 1, 1964. | No statutory remedy available to aggrieved owner. Enforcement was essentially the job of the Attorney General.  | To provide former owner with a legal means of protecting himself against governmental abuses, and to relieve the Attorney General of the enormous task of policing land-taking procedures on behalf of individual citizens. |
| Sec. 16 of Chapter 79<br>G. L.<br>Sec. 6 of Chapter 579,<br>Acts of 1964            | Delete second paragraph of Sec. 16 of Chapter 79, G. L., as appearing in Sec. 1, Chapter 797, Acts of 1962.<br>Effective November 1, 1964.   | Second paragraph, Sec. 16, Chapter 79, G. L.  | Clarify new statute by eliminating provision made unnecessary by Chapter 579, Acts of 1964.   |
| Sec. 22 of Chapter 79<br>G. L.<br>Sec. 1 and Sec. 4 of Chapter 548,<br>Acts of 1964 | Interest shall accrue at rate of 6% per annum on unpaid judgments in eminent domain cases.<br>Effective January 1, 1965.   | No interest is payable upon a judgment against the Commonwealth.<br><i>General Electric Co. v. Comm.</i> , 329 Mass. 661; Sec. 3, Chapter 258, G. L.; last sentence of Sec. 22, Chapter 79, G. L. | Compensate property owner for delay in payment of judgments.  |
| Sec. 35A of Chapter 79<br>G. L.<br>Chapter 457,<br>Acts of 1964                     | Amount of tax apportionment to which former owner is entitled must in litigated cases be determined by trial judge.<br>Effective September 1, 1964.  | No provision.   | Uniformity of procedure.  |

# COMMONWEALTH OF MASSACHUSETTS — DEPARTMENT OF THE ATTORNEY GENERAL

## ANALYSIS OF CHAPTER 79 AS AMENDED BY CHAPTERS 448, 457, 548, 579 and 633 ACTS OF 1964

| Reference   | Statute as Amended  | Law prior to Amendments  | Purposes of Amendments  |
|---|---|--|---|
| Sec. 36A of Chapter 79<br>G. L.<br>Sec. 7 of Chapter 579,<br>Acts of 1964 | Land-damage judgments must be satisfied within 30 days after waiver or exhaustion of rights of appeal therefrom.<br>Effective November 1, 1964.   | No statutory deadline for payment of judgment; often takes several months.             | To assure prompt payment of land damage judgments.  |
| Sec. 37 of Chapter 79<br>G. L.<br>Sec. 2 of Chapter 548,<br>Acts of 1964  | Interest at the rate of 6% per annum shall accrue on total amount any unpaid land damage judgment against the Commonwealth.<br>Effective January 1, 1965.   | No comparable provision.   | To compensate former owners for delay in payment of judgments.  |
| Sec. 39 of Chapter 79<br>G. L.<br>Sec. 3 of Chapter 548,<br>Acts of 1964  | Provision comparable to Sections 22 and 37 on payment of interest on judgments for accrual of interest at rate of 6% per annum on unpaid settlement awards made by taking agencies.<br>Effective January 1, 1965.   | No comparable provision.   | To compensate former owners for delay in payment of settlement awards.  |
| Sec. 7B of Chapter 79<br>G. L.<br>Sec. 3 of Chapter 579,<br>Acts of 1964  | Payment of a amount of damages awarded must be made either within 60 days after order of taking is recorded or within 15 days after demand by former owner at election of taking agency. Such election must be made <i>before notice of taking is sent to owners</i> .<br>Effective November 1, 1964. | No statutory deadlines for payment of damages; often takes months and sometimes years. | To assure prompt payment of damages, thereby reducing hardship to former owners and avoiding the accrual of large amounts of interest payable by the taking agency. |
| Sec. 7C of Chapter 79<br>Sec. 3 of G. L.<br>Chapter 579,<br>Acts of 1964  | Notice to owner must include announcement of time and place at which he can obtain payment of damages awarded.<br>Effective November 1, 1964.   | No comparable provision.   | To inform former owner of his right to prompt payment under Sec. 7B.  |

# COMMONWEALTH OF MASSACHUSETTS — DEPARTMENT OF THE ATTORNEY GENERAL

## ANALYSIS OF CHAPTER 79 AS AMENDED BY CHAPTERS 448, 457, 548, 549 AND 633 ACTS OF 1964

| Reference  | Statute as Amended  | Law prior to Amendments  | Purposes of Amendments   |
|--|---|--|--|
| Sec. 7D of Chapter 79 G. L.<br>Sec. 3 of Chapter 579, Acts of 1964 | If ownership of property is unknown or is in a legally incompetent person, damages awarded must be paid to Superior Court, which orders such funds deposited in a savings bank or similar institution. If apportionment of damages among several known owners is uncertain or disputed, the same procedure may be followed. Persons entitled to such funds may recover them from court with any accrued interest upon proving their right thereto.<br>Effective November 1, 1964. | No comparable provision.   | To permit taking agencies to dispose of cases when damages cannot immediately be paid to persons entitled thereto.   |
| Sec. 7E of Chapter 79 G. L.<br>Sec. 3 of Chapter 579, Acts of 1964 | Damage checks unclaimed for 60 days after issuance may be paid into the Superior Court in accordance with Sec. 7D procedures.<br>Effective November 1, 1964.  | No comparable provision.   | To relieve taking agency of responsibility for unclaimed damage awards.  |
| Sec. 7F of Chapter 79 G. L.<br>Sec. 3 of Chapter 579, Acts of 1964 | Local collector of taxes must be sent a copy of any petition for deposit of damage awards in the Superior Court under Sec. 7C or Sec. 7D procedures.<br>Effective November 1, 1964.   | No comparable provision.   | Consistency with new Sec. 7D.  |
| Sec. 7G of Chapter 79 G. L.<br>Sec. 3 of Chapter 579, Acts of 1964 | (1) Damages awarded may be accepted by those entitled thereto without waiver of right to claim additional damages, but no interest accrues on amount paid or deposited in Court.<br>Effective November 1, 1964.<br>(2) If damages assessed in Court are less than damages awarded by taking agency, the excess must be refunded with interest.<br>Effective November 1, 1964.   | (1) No statutory provision; may be the same as existing common law in part.<br>(2) No statutory provision; may be the same as existing common law. | (1) Protection of former owner against loss of right to full and fair compensation by his acceptance of payment of amount awarded by taking agency.<br>(2) Equalization of the risk between owner and taking agency in land damage litigation. |

| Reference  | Statute as Amended   | Law prior to Amendments  | Purposes of Amendments  |
|--|--|--|---|
|  | (3) Taking agency may recover any damages paid to a person not entitled thereto.<br>Effective November 1, 1964.  | (3) No comparable provision.   | (3) Protection of taking agency from inequity arising from erroneous payment.   |
| Sec. 8 of Chapter 79<br>G. L.<br>Sec. 4 of Chapter 579,<br>Acts of 1964  | Repealed; provisions distributed to new Sec. 7C and Sec. 7E.<br>Effective November 1, 1964.  | Notice of taking to former owners and to local tax collector.  | Clarification by improved sequence of statute.  |
| Sec. 3 of Chapter 79<br>G. L.<br>Sec. 1 of Chapter 579,<br>Acts of 1964  | Title shall vest in taking agency and right to damages shall vest in former owner upon recording of the order of taking <i>regardless of the purpose of taking</i> .<br>Effective November 1, 1964.  | Time title and right to damages vested depended on <i>purpose of taking</i> : upon entry on land in highway and highway drainage takings; upon <i>recording</i> of order of taking in most other cases.                                      | Uniformity of treatment simplification of administrative procedure by eliminating need for formal entry on land taken and for preparation and filing certificates of entry in highway cases.  |
| Sec. 6 of Chapter 79<br>G. L.<br>Sec. 2 of Chapter 579,<br>Acts of 1964  | (a) Requirement that award of damages be voted upon adoption of order of taking made applicable to all taking agencies other than private corporations.<br>Effective November 1, 1964.<br><br>(b) Power in taking agency to amend award prior to payment thereof because of change of ownership or value or for other good cause.<br>Effective November 1, 1964.<br>(c) Other amendments for consistency with Sec. 3 of Chapter 79, G. L., above.<br>Effective November 1, 1964. | (a) Requirement that award of damages be so voted confined to takings made "on behalf of the commonwealth, or of a county, city, town or district."<br><br>(b) No comparable provision.<br><br>(c) (See Sec. 3 of Chapter 79, G. L., above.) | (a) Clarification; probably involves no actual change in meaning.<br><br>(b) To permit adjustment of award in event of change of circumstances between time award is made and time it becomes effective.<br><br>(c) (See Sec. 3 of Chapter 79, G. L., above.) |
| Sec. 7A of Chapter 79<br>G. L.<br>Sec. 3 of Chapter 579,<br>Acts of 1964 | Damage to property must be appraised before award of damages is made.<br>Effective November 1, 1964.   | No statutory provision; probably required under existing common law.   | To assure realistic awards of damages at the outset, thereby providing a prompt realistic payment to the property owner and eliminating much potential land-damage litigation.  |



## Employment Security

The Division of Employment Security of the Department of the Attorney General works in close conjunction with the Massachusetts Division of Employment Security. Members of the Division are concerned with the prosecution of employers who are delinquent in making employment security tax payments and with the prosecution of fraudulent compensation claimants. Complaints brought against corporations and individuals in the aforementioned categories have resulted in large sums of money being recovered for the Treasury of the Commonwealth.

However, in no instance is an individual or corporation unfairly or hastily prosecuted. Every opportunity is given to both corporations and individuals to make restitution. Only after persuasion fails are criminal charges brought.

The approved procedure, relative to delinquent employers is as follows: The contributions department of the Massachusetts Division of Employment Security sends a demand notice to the employer, specifying the amount due. If there is no response, a second demand is sent, which is then followed by contact with the employer by the field service department of the agency. The field investigator endeavors to obtain payment, or to obtain reports in those cases where the employer has failed to file quarterly returns. After all administrative procedures have failed, the case is referred to the Legal Department of the agency. Civil court action is instituted by the Division Counsel as provided by G.L., c. 151A; the cases are brought to judgment and execution, and demand is made on the execution. Only when civil process in the courts have been exhausted, or adequate arrangements for payment cannot be made or are not kept up, is the case referred to the Employment Security Division of the Department of the Attorney General.

In each case the subject employer and the principal officers of the corporation are given many opportunities to come and discuss their financial problems and to arrange for a schedule of payments. In the event that cooperation is not elicited, the employer is notified by letter that we are preparing the case for prosecution. This often encourages payment without further court action; but, if not, the employer is notified that we have no alternative but to proceed with prosecution in accordance with the provisions of the law.

When enforcement is sought under the criminal provisions of the law, many employers who previously have completely ignored all correspondence and demands for payment, somehow find means of raising the money. Further, the prosecutions have encouraged other employers to take a more serious attitude toward payment of these taxes.

Diligent prosecution of delinquent employers, coupled with detailed investigation has brought the following results: During this fiscal year, in 134 employer cases, \$130,869.78 was collected; in addition to this, 856 criminal complaints were brought against 68 employers.

Due to the intensive efforts of this Division there has been a reduction in the number of delinquent employers, in areas where the Division

has prosecuted — employers' having become cognizant of the fact that state taxes must be paid. Moreover, this reduced number of fraudulent cases has been of benefit to employers, for it has helped to keep the employment tax rate for employers minimal, with 3.7 the maximum Massachusetts tax rate.

The Division has also conscientiously prosecuted claimants who illegally collect unemployment benefits. As the result of these efforts, forty-seven such cases were closed during the period of this report. \$21,671.00 in overpayment benefits owed the Commonwealth were recovered and 922 criminal complaints were issued against 35 employees.

In addition to the cases mentioned above, three cases were argued by the members of this Division before the Supreme Judicial Court on behalf of the Director of the Division of Employment Security. In all instances a decision favorable to the Director was obtained.

### Finance Division

The responsibilities of the Finance Division include assisting the Department of Corporations and Taxation; the Department of Insurance; the Department of Banking and the State Treasurer with legal problems and litigation on the appellate level. In addition, a member of this Division sits on the Contributory Retirement Appeal Board, in compliance with the statute so providing, and also acts as counsel for the Board.

Further, the Division acts as counsel to the Treasurer and Receiver-General of the Commonwealth and also represents the State Retirement Board and the Teachers Retirement Board. The members of the Division are active, too, in helping to research and prepare opinions requested of the Department of the Attorney General in the aforementioned areas. Finally, this Division includes in its responsibilities that of rendering constant legal advice and informal opinions to citizens and state officials in a variety of situations involving the general area of its assignment.

With particular respect to the Department of Corporations and Taxation, this Division has the obligation of furthering litigation above the administrative level. Most of the cases coming to our attention involve review of decisions made by the Appellate Tax Board although, on occasion, when the matter concerns inheritance or estate taxes, a decree of a probate court is involved. During the period covered by this report, five cases have been argued in behalf of the Department in the Supreme Judicial Court. A true picture of the work of this Division cannot be portrayed by setting forth statistics on the victories or losses, but it can be asserted that in each instance we have been able, through judicial determination, either to test existing tax statutes or to decide whether new legislation is necessary to close loop-holes which deprive the Commonwealth of a great deal of revenue.

Cases of note include *Steward, Executor v. Tax Commissioner*. The resolution of the legal question in that case resulted in \$350,000 in taxes being due the Commonwealth. *Old Colony Trust Company v. Commis-*

sioner of Corporations and Taxation concerned the value of consideration given for the establishment of a trust.

With respect to the Department of Banking and Insurance, during this year, this Division has argued four cases in the Supreme Judicial Court, two in the United States District Court and several before the Superior Courts of the Commonwealth. All of the cases involved appeals from the decisions of the respective commissioners. Cases of note argued for this Department include *David Rose, Commissioner of Insurance and Chicopee Co-Operative Bank, et al v. The Board of Bank Incorporation*. The former case was argued at the November, 1963, sitting of the Supreme Judicial Court. The court held that the medical service contract [Blue Shield] entered into between Harvard University and the Massachusetts Medical Service was valid and that, therefore, Dr. Rose was bound by the fee schedule established by that contract. The decision of the Superior Court was thereby affirmed and the plaintiff was ordered to return the surcharge he had been paid by his patient, an employee of Harvard University. The *Chicopee Bank* case involved the conversion of a co-operative bank to a Federal Savings and Loan Association under Chapter 170, § 49, of the General Laws. The Board granted the conversion and the petitioner appealed. The case was presented to the Full Bench of the Supreme Judicial Court by reservation and report from a single justice. In its decision the Court stated that the declared purpose of the conversion was not to merely withdraw from the state system, but to merge with and become a branch of a large federal savings and loan association. The Board was held to have exceeded its authority by deciding that the proposed merger would promote the public convenience and advantage. The decision of the Board of Bank Incorporation was therefore reversed.

The duties of the member of the Division with regard to retirement matters are dual in nature. During this fiscal year, we have been able for the first time, to hear appeals which had been filed within a period of thirty days. The long list of continued cases was finally completely exhausted. During this year, full-scale hearings have been held in approximately two hundred appeals and of this number, less than ten percent of the decisions have found their way to the Superior Courts and fewer than two percent to the Supreme Judicial Court. One case which was taken to the Supreme Judicial Court was *Easthampton Retirement Board vs. Contributory Retirement Appeal Board*. The matter involved accidental death benefits to the widow of the former Recreational Director in the Town of Easthampton. The local board had denied benefits and the Contributory Retirement Appeal Board reversed the decision and awarded benefits, which decision was affirmed by the Superior Court. The case was argued before the Full Bench of the Supreme Judicial Court and the decision of the Contributory Retirement Appeal Board was sustained.

The preparation and writing of briefs and subsequent trial of cases such as the above consumes a great deal of the time of the personnel of this Division.

Much time is also devoted to drafting opinions requested by the above-named state agencies. An opinion of outstanding importance considered by the members of the Finance Division concerned the matter of tax assessments. Several months of research and conferences with the Tax Commissioner's Office, representatives of taxpayer federations, and interested citizens preceded the issuance of the opinion. The problem of tax assessments was resolved in the opinion which placed the primary responsibilities upon local authorities. It is the purpose of this opinion to see that the decision of our Supreme Judicial Court [*Bethgole vs. Assessors of Springfield*, 343 Mass. 223] is adhered to, with the assistance of the Tax Commissioner and those local authorities who would attempt to correct improper methods of assessment. Several other opinions have also been drafted by the members of this Division.

### Division of Health, Education and Welfare

The Division of Health, Education and Welfare was created in January, 1963, as detailed in the 1963 Annual Report. During the past year the Division's activities have concentrated on increasing the effectiveness of the operation of the Administrative Procedure Act (G.L., c. 30A), within the many state departments, agencies and boards assigned to the Division, and augmenting and refining the powers of several state departments, agencies and boards through legislation and regulation. Brief summaries of the work accomplished for each state agency assigned to this Division are set forth below.

#### *Department of Public Health*

The Department requested the division to take action against 14 cities and towns in order to correct health hazards: contaminated water supplies, the improper discharge of effluent from sewage treatment plants into rivers and streams, and pollution of the atmosphere by the improper operation of town dumps and piggeries. After additional investigation and discussion with the appropriate city and town officials, the problem was corrected in all but a few instances. The Division was required to bring two actions in the Superior Court against towns which failed to comply with department orders. In addition, the Division drafted many opinions for the Department of Public Health, represented it in 6 cases before the Superior Court and in 2 instances before the Supreme Judicial Court.

Work by the Division for the Massachusetts Hospital School in Canton included title opinions and certifications forwarded to Washington so that that institution could receive Federal aid for certain building programs.

#### *Department of Education*

While acting as legal counsel for the Department of Education and various other educational agencies, the Division has reviewed, revised and approved a concessionaire's agreement and several other contracts; drafted many opinions dealing with State Teachers Colleges and the Southeastern Massachusetts Technological Institute; defended the Department in one

action before the Superior Court and reviewed title abstracts, purchase and sale agreements, deeds and taking papers in land acquisitions for the State Teachers College in Fitchburg, the Salem State Teachers College, the Bridgewater and Framingham State Teachers Colleges and the South-eastern Massachusetts Technological Institute.

All of this work resulted in the expansion of educational facilities at the State Teachers Colleges in Framingham, Salem, Bridgewater and Fitchburg and the Southeastern Technological Institute.

#### *Department of Public Welfare*

During the period covered by this report the Division has represented the Department of Public Welfare in eight cases before the Supreme Judicial Court and in fifty-four cases in the Superior Court. In addition, considerable work has been done to improve the hearing procedures and strengthen and clarify the rules and regulations of the Department.

#### *State Housing Board*

The Division has reviewed title to twenty-seven parcels of land to be acquired either by the State Housing Board or by local housing authorities. In addition, the members of the Division have been called upon to perform the necessary legal work for the taking of twenty-five additional parcels of land throughout the Commonwealth for housing projects. One hundred fifty-one new building projects have been reviewed and approved by this office. Each project required individual consideration, from the vote of the local housing authority authorizing the project to the development of a workable contract of assistance between the State Housing Board, the local housing authority and the financing agency. The Division has represented the State Housing Board in three cases before the Superior Court.

#### *Massachusetts Board of Regional Community Colleges*

As legal counsel for this Board, the Division commenced six cases in the Appellate Tax Board.

### **Industrial Accidents Division**

In accordance with the provisions of G.L., c. 152, § 69A, the Attorney General must approve all compensation payments made under this Chapter by the Commonwealth, as a self-insurer, to state employees who sustain injuries arising out of and in the course of their employment with the Commonwealth, including also the payment of related medical and hospital expenditures resulting from such injuries.

In 1963 this Division faced a heavy backlog of cases before the Industrial Accident Board. Most of these cases then were from two to four years old. This situation worked an undue and unfair hardship on injured state employees but also imposed the possibility of a greater financial liability in workmen's compensation costs to the Commonwealth. With the cooperation of the Chairman of the Industrial Accident Board and its Supervisor of Compensation Agents, these cases have received the close and constant attention of this Division.

Through the maximum use of the Board's pre-trial procedure a substantial number have since been adjusted without trial. Many others have been tried and decisions rendered. During the fiscal year covered by this report this Division engaged in 450 appearances on Commonwealth cases before the Industrial Accident Board sitting in several cities throughout the Commonwealth. This figure includes hearings, pre-trial and other assigned conferences. In addition, there were 85 conferences on fatal cases with the Board and insurance company representatives concerning contributions to the "second injury" funds of the Commonwealth. [§§ 65 and 65N]

Equally important to this Division is the handling of current claims for compensation benefits in lost-time disability cases. Our policy of giving prompt approval of proper claims has received the praise of state employees' groups, such as the Massachusetts State Council representing state employees and the Massachusetts State Employees' Association. Our approach has done much to restore the confidence of state employees in an important employer-employee relationship. It is also designed to prevent any unnecessary future litigation on claims that should be adjusted at their inception. The policy has also resulted in a reduction of the financial liability of the Commonwealth. In this fiscal period the Division approved 972 agreements for payments of weekly compensation submitted by the various compensation agents during such period. This represents a marked increase in approvals on lost-time cases.

During the same period a total of 6,825 first reports of injury were filed, including the no lost-time claims on which the Attorney General's office is required to review for approval all outstanding bills.

Total payments made by the Commonwealth to injured state employees under § 69A for the period, July 1, 1963 through June 30, 1964, were as follows:

|   |                |
|---|----------------|
| Industrial Accident Board [General]:        |                |
| Public Employees — Incapacity Compensation  | \$ 997,295.34  |
| Public Employees — Doctors and Nurses et al | 152,267.28     |
| Public Employees — Hospital, Drugs, et al   | 175,418.91     |
|   | <hr/>          |
|   | \$1,324,981.43 |
| Metropolitan District Commission *:         |                |
| Incapacity Compensation                     | \$ 106,540.11  |
| Medical and Hospital Costs                  | 48,799.97      |
|   | <hr/>          |
|   | \$ 155,340.08* |

\* Please note that these disbursements are from MDDC funds.

Despite the increase in the number of new agreements approved over previous years, the amount paid from the General Compensation Account was reduced by \$45,560 over the previous fiscal period. An increase in the hospital and medical payments is attributable largely to continued in-

creases in rates applicable in Workmen's Compensation cases. The substantial number of older and usually costlier cases which were disposed of through adjustment, settlement or Board order during this period remains a strong factor in maintaining a high-cost level in these claims.

This Division represents the Commonwealth at the Industrial Accident Board in its capacity as custodian of the so-called "second injury" funds in petitions by insurers for reimbursements under § 37A of c. 152 payable out of that fund [Veterans Industrial Accident Fund] established under §65N of c. 152 and similar petitions under § 37 of c. 152 payable out of the fund [General Industrial Accident Fund] established by § 65. The Division also processes claims by the Commonwealth under these provisions for payments by insurers into these funds.

At the close of the fiscal year 1964, the balance on hand in the Veterans' Fund [§ 65N] was \$269,688 with \$18,294 collected during that 12-month period. Disbursements totaled \$62,490.

The balance in the General Fund [§ 65] at the close of the same fiscal year was \$13,237 with collections for the period \$75,475. Payments totaled \$68,593.

Since payments into the "General" or § 65 fund are required only in fatal cases where the deceased employee leaves no dependents, unlike the "Veterans" or § 65N fund into which payments are required in all fatal cases, the former fund showed a steady decline from \$86,396 in 1956 to \$6,355 at the close of fiscal 1963. In July 1963 the Legislature enacted special emergency legislation in Chapter 554 of the Acts of 1963 to remain in effect until December 31, 1964, which provided that for the effective period of that Act, notwithstanding the provisions of § 65N of c. 152, all payments made by insurers or self-insurers under § 65N would be credited to the special fund under § 65 ["General" fund] and used for the purposes of that second-injury fund and under the conditions set forth in §§ 37 and 65 of c. 152. This accounts for the decline in the balance in the "Veterans" fund at the close of fiscal year 1964 and the temporary increase in the balance on hand in the "General" fund. This legislative enactment thus made it possible to make proper reimbursements to insurers out of the latter fund, many of which claims had been outstanding for some time due to the lack of funds.

It is the responsibility of the Attorney General to handle these funds so that the legislative intent is fulfilled. He must also see to it that the stability of the funds is maintained by proper supervision of claims thereunder. An important consideration in this regard is the funding process. While the "General" fund [§§ 37 and 65] has no built-in provision for reimbursement in the event the fund becomes exhausted, the "Veterans" fund differs in that § 37A of c. 152 provides that if this fund becomes exhausted, the State Treasurer shall make such payments from the general fund of the Commonwealth without appropriation.

## Public Charities

The Division is notified in the course of each year of thousands of proceedings in the Probate and other courts with regard to public charities. The largest percentage of such cases are proceedings for the allowance of accounts of trustees. All accounts and other matters are examined carefully and in many cases, questions are raised before the Court. The current year was typical in respect to the large number of matters brought to our attention, and reference is made hereinafter to some of the more important cases presented to the Courts.

In addition to the above, the Division receives, records, and files thousands of annual financial reports and other data, required under the provisions of G.L., c. 12, §§ 8A-8J, inclusive. These files are open to public inspection.

Each account and financial report is examined. If discrepancies are noted, letters are written requesting explanations. In addition we have initiated a program of directly examining the records and accounts of some of the public charities filing annual financial reports when questions are raised as to their methods of operation. We hope to increase the number of such investigations and to expand the investigations to some of the testamentary trusts, as occasion arises.

The organized charities of Massachusetts are conducted properly in nearly all cases and do a great deal of good. Only a very few are open to suspicion of insincerity or solicitation for selfish ends. Even the family foundations, becoming quite numerous because of the provisions of the Internal Revenue Code, appear to be operated with good charitable intentions and within the provisions of our laws. From time to time a few cases occur when the funds of such foundations are diverted from their proper charitable channels. The Division watches as carefully as possible to see that no such instance escapes notice and correction.

To the end of encouraging the due and proper application of all charitable funds, complete cooperation with the press is fostered. The Department has found that there is a continuing interest on the part of the press in matters concerning charities. Press coverage has made the public, and the charities, aware of the governmental concern with and supervision of charitable funds.

While the existing and new legislation regulating charitable solicitations does not answer all the problems presented by public charities, it supplies a measure of control far beyond any which existed in Massachusetts before.

Presently, the Division is preparing new and revised forms of applications, financial and other reports, required of public charities which are subject to the new and changed statutory provisions. These new forms will be available for use upon the effective date of the Acts. Action has been taken on the Federal level to discourage mere accumulation of funds for charity, and self-dealing by trustee-donors, by denying exemption from taxation in certain instances. However, it is questionable whether any solution short of further state legislation regulating trusts



for charitable purposes will fully remedy the situation. Some of the remaining problems concern the grant of wide powers of investment and the broad exculpatory provisions inserted in instruments creating charitable foundations, the creators of which are frequently designated as trustees.

In the course of a study of charitable foundations in one of our neighboring states, it was revealed that a representative of one of the leading trust companies there was quoted as stating that he had never heard of some of the investment clause grants included in foundation instruments. He was of the opinion that no trustee would be safe in using them even though the instruments included sweeping exculpatory clauses designed to protect the trustee from personal liability.

One of the recommendations of the study referred to was that legislation was necessary to provide that, regardless of any language of the trust instrument, the attempted exoneration of a trustee of an inter-vivos charitable trust from liability to exercise reasonable care, diligence and prudence should be deemed contrary to public policy. Such a provision, it was stated, would prevent the dissipation of charitable funds by improper conduct of trustees without interfering with gifts by charitably minded donors.

The Division, is as stated, maintaining as close a watch as possible over the operations of the foundations and is following the investigation of Congressman Wright Patman of Texas, Chairman of the Select Committee on Small Business of the U. S. House of Representatives, for possible disclosure of situations requiring the enactment of state legislation to remedy any improper administration of such charitable trusts.

#### *Cy Pres and Other Court Proceedings.*

Some of the many court proceedings in which the Division participated in the reporting period are detailed in the following paragraphs.

*The Hawes Fund.* This charity was created almost one hundred and fifty years ago under the will of John Hawes, a resident of South Boston. He provided that about half of the trust funds should aid a Congregational Church in South Boston, for the site of which he had given a portion of his farm. The church was later known as the Hawes Place Unitarian Church. It ceased services and meetings in 1950. The remaining portion of the fund he provided should be used for a school open to the public in South Boston. The most recent application of the latter portion of the fund was for classes held at the Boys Club in South Boston.

The fund now has a value of about \$500,000. The benefit of the religious portion of the fund is claimed by a Trinitarian Congregational Church in South Boston and by various Unitarian organizations which are active there. The Attorney General took the position that despite the fact that the Hawes church had ceased to exist, the charity had not failed and the religious portion of the fund shall be used, as the Court should decide, over the intention of the testator, and further either Unitarian or Trinitarian Congregational doctrines, and that the education portion should continue to be used to support classes at the Boys Club in South Boston. After extended hearings, a master appointed by the Supreme Judicial

Court filed a report favoring the application of the religious portion of the trust for the benefit of the Trinitarian Congregational Church and the application of the education portion for maintaining classes at the Boys Club in South Boston. Proceedings for confirmation of the master's report, and objections thereto, are to be considered by the Court.

The bequest under the will of Laban Pratt for a hospital in Weymouth. The testator, who died in 1924, left \$300,000 to the Town of Weymouth for a hospital. Because of the inadequacy of the original amount of the gift, no action was taken for many years. Later, because of war and post war shortages it was not possible to consider construction of a hospital. In recent years greatly increased costs of construction as well as of equipment and maintenance would make it difficult to properly staff a hospital, and to defray the costs of construction. In addition, there would be a duplication of the facilities of the South Shore Hospital also located in Weymouth. Proceedings were instituted by the Town in the Probate Court, the Attorney General and the heirs being made parties, and a master was appointed. The Attorney General's position was that the gift had not failed, the heirs of the testator had no claims against the fund and that if it was impracticable to carry out the testator's general charitable intentions in the way he had suggested, the Court should authorize the use of the fund for hospital purposes in a way to approximate the donor's intentions. After many days of hearing the master filed a very comprehensive report which was confirmed by the Court and a decree was entered excluding the heirs from any interest in the fund (then amounting to about \$1,000,000) and for its application, under the doctrine of *cy pres* with other funds to be furnished by the recipient, for the erection of an addition to the South Shore Hospital to be known as the "Laban Pratt Memorial Wing."

The *Catherine Johnson* case. A decree was entered on a petition brought by the trustees under her will in the Probate Court for the County of Essex, to which the representatives of the residuary legatees under her will were parties, determining that it was impracticable to use the testatrix's gift in the way she intended, i.e., by the establishment on her home property of a home for old ladies of North Andover, but that the testatrix had a general charitable intention such that the property should be applied, under the doctrine of *cy pres*, for a similar purpose and that the residuary legatees were not entitled to any benefit by way of resulting trust. An appeal was taken to the Supreme Judicial Court by the residuary legatees. A brief was filed for the Attorney General which supported the decree of the Probate Court. Against the strong opposition of counsel for the residuary legatees, the decree of the Probate Court was affirmed and a motion for rehearing filed on behalf of the residuary legatees was denied.

Extended hearings were held in the Superior Court on a petition brought by a member of the Second Church in Boston to restrain the sale by the Church of five silver vessels given to the Church in pre-revolutionary times for use in church services. The five silver vessels had, for many years, been kept and exhibited with other colonial silver of the Church,

at the Boston Museum of Fine Arts, being removed therefrom only occasionally for exhibition at the Church. The petitioner argued that the silver vessels had been given subject to a trust requiring that the Church hold and use the silver vessels for religious services. The sale which was in issue was to the Henry Francis de Pont Winterthur Museum in Delaware, for purposes of exhibition, and the agreed price was \$50,000. The Justice of the Superior Court who heard the case ruled that the Church had the right to sell the silver and has reported his decision to the Supreme Judicial Court. The case will be heard on review before the Supreme Judicial Court sometime in the coming fall.

Another *cy pres* proceeding is that concerned with the gift under the will of *Lillis R. Sawyer* for the purpose of establishing a Community House in Shelburne Falls. The fund was not large enough for the purpose designated at the time the donor died, and later the shortages and restrictions of the World War II, and post World War II periods prevented construction. A plan was approved a few years ago for the use of the fund for the construction of a hall as part of a proposed regional school, but the plan failed because the school was not approved by the towns involved. The inadequacy of the present funds (about \$250,000), in view of current costs and other factors, was relied on by the trustees as justifying the entry of a decree by the Probate Court, under the *cy pres* doctrine, authorizing the use of the income and principal for concerts, lectures, and other community activities. The position taken for the Attorney General was that the gift would not fail in any event, and that if the Court was satisfied the inadequacy of the fund made it impracticable or impossible to carry out the testator's plan, some such plan as that proposed could be adopted. At the time of this report the case had been taken under advisement by the Probate Court judge.

Members of the Division participated in proceedings, in the Probate Court and in the Land Court, involving first a sale, and later a ninety-nine year ground lease, of property on Boylston Street, in Boston, by the trustees under the will of *George Robert White*. The Court dismissed the petition for the sale of the premises. In subsequent proceedings the Probate Court, after hearing, approved a ninety-nine year ground lease of the property containing options permitting the lessor to require the lessee to purchase the land, and giving the lessee options to purchase.

Proceedings, commenced with the approval of the Attorney General, for the determination of the validity of various changes initiated with respect to the operation of the Arnold Arboreteum (See *Ames v. Attorney General*, 332 Mass. 246) which had been heard before a master appointed by the Supreme Judicial Court were continued. The master's report has been confirmed and a motion for the entry of a final decree in accordance with the findings of the master has been made.

The Division participated in arguments before the Supreme Judicial Court on an appeal taken by a church desiring to be the recipient of a *cy pres* application of funds under the will of *Wilhelmina W. Jackson*. The Court dismissed the appeal.

Also requiring the attention of the Division were several hearings in the Superior Court with respect to the proper governing body of an incorporated economic research organization. The proceedings were brought by a group claiming to have been illegally suspended as members of the governing board of the corporation. All parties agreed that a responsible independent governing board should be provided for, and agreements to that end are expected to be worked out.

In addition to the foregoing the Division participated in a great many other proceedings before the Courts, including proceedings for the determination of the reasonableness of trustees' fees, the adequacy of the prices for real estate for which licenses to sell were sought, and proceedings regarding the dissolution of charities and the application of charitable funds *cy pres*.

### *Perpetual Care Funds*

Funds given for the perpetual care of individual lots in cemeteries have not, historically, been considered to be public charities. Inasmuch as the funds are for the care of a particular grave or lot, the trust has a direct and definite object other than the indefinite benefit of the public.

Statutes, have, however, provided that private and public cemeteries may accept funds to be held in perpetuity, the income to be used to care for a burial lot designated by the creator. While these perpetual care funds are similar to charitable trusts, in that they can exist in perpetuity, it is obvious that rights to enforce the interests of particular creators, like the property interests in the grave lot of a deceased owner, pass to the heirs of the deceased creator or to the persons designated in his will to take his interests in the burial lot. This situation is quite different from that as to donors of funds for public charitable purpose where only in the event of a failure of the charitable purpose and the lack of a general charitable intent on the part of the donor do the heirs have any possible interest.

A perpetual care fund consisting of a consolidation of the amounts paid by lot owners, or others, for perpetual care of particular lots, is no more strictly a public charity than a single small fund, although it does have some similarity to a perpetual public charitable trust fund which must be kept in tact as to principal. There is a public, as well as private interests, in such a consolidated fund. Testamentary, and other trusts, for the care and upkeep generally of publicly owned and perhaps of other kinds of cemeteries, are to be distinguished from funds established for the care of particular lots. In most instances the latter type of fund does constitute a public charity and such trusts are directly supervised by the Division. The administration of the former type of fund is also closely scrutinized whenever any occasion arises in view of the public interest involved.

### *Public Administration and No Heir Will Cases*

The interest of the Commonwealth in these cases arises out of the possibility of the escheat of the funds of the deceased.

The system of administration by public administrators has been criticized and there have been objections to the methods followed by certain public administrators in seeking appointments in particular estates and to their activities in the handling of estates.

The Division checks the thousands of public administration matters presented to us each year as carefully as possible, and objects to any transaction believed to be against the best interests of the Commonwealth or the possible heirs.

### **Torts, Claims and Collections Divisions**

The Torts, Claims and Collections Division represents Commonwealth employees in tort actions (civil wrongs) brought against them. The Division determines the merits of each case and determines what is a reasonable amount for the damages involved.

General Laws, chapter 12, Sec. 3B provides that the Attorney General shall defend state employees who operate state-owned vehicles in the course of their employment. The Attorney General may settle claims against state employees for not more than \$10,000 in case of injury to, or death of, one person, and for not more than \$5,000 for property damage.

The Division points with understandable pride to the fact that it has not had to seek a supplemental appropriation from the Legislature for payment of motor tort claims during this fiscal year. For the fiscal year ending June 30, 1960 the sum of \$30,000 was obtained as a supplementary appropriation for motor tort claims and for the fiscal year ending June 30, 1961 the sum of \$5,000 was obtained as a supplementary appropriation for motor tort claims.

The Torts, Claims and Collections division has for the first time in its history kept records in order to determine the average amount of motor tort settlements under Chapter 12, §§ 3B and 3C. It appears that from January 15, 1963 to June 30, 1963 the average motor tort settlement, including trials, was \$407.00 for 112 claims. During the fiscal year July 1, 1963 to June 30, 1964 the average motor tort settlement was reduced from \$407.00 to \$312.09 for 320 claims thereby achieving a reduction of about 25% in average motor tort settlements.

The Division has been able to work within its allotted appropriation and to maintain a proper average of motor tort settlement as a result of the following major innovations in claim procedures:

1. All claims for damage to property in excess of \$100 are promptly appraised by an independent appraiser.

Prior to January 15, 1963 property damage appraisals were obtained only in rare instances and then after repairs had already been made by claimant.

2. In all claims for personal injuries or in the event it appears from the facts that a personal injury claim may be forthcoming, arrangements are promptly made for a medical examination by a medical examiner selected by this Division.

Prior to January 15, 1963 arrangements for medical examinations by a medical examiner selected by the Division was made only in selected cases and often after the period of disability of claimant had ended.

3. Lists of appraisers for property damage and medical examiners are now practically completed. They will serve in all areas of the Commonwealth of Massachusetts as guides so that there will be no delay in arranging for property damage appraisals of medical examinations.

Prior to January 15, 1963 no list of appraisers for property damage and medical examiners throughout the Commonwealth of Massachusetts was available and as a result, there was substantial delay in arranging for medical examinations and property damage appraisals of claimants.

4. Claims have been properly investigated so that equitable evaluation of the claims is possible. As a result, during the past fiscal year, the number of plaintiffs obtaining verdicts has been very small, and in such instances the verdicts have not been substantial.

The files which were kept prior to January 15, 1963 indicated lack of sufficient investigation for a proper evaluation of claims.

The Division also handles moral claims and defective highway cases. Moral claims (damages occurring in circumstances that impose a moral, though not legal, liability upon the Commonwealth, such as injuries caused by deers crossing the road) have accounted for thirty-one cases which have been settled for an average amount of \$139.22 per case. Nine cases have arisen from defective state highways, and the average settlement per case is \$249.64. Small moral claims have been settled for an average of \$42.24 in the 120 cases considered. Statistics on moral claims and defective state highways are not available prior to January 15, 1963 so that no comparison with previous administrations is possible.

All correspondence in the motor vehicle tort area is up-to-date, acknowledged and answered on a current basis.

The Division also represents all state departments in civil actions to recover money due the Commonwealth for damage to state property, for care of patients in state institutions, or for other obligations owed to the various departments.

The following collections have been made in 847 cases during the period covered by this report:

| <i>Department</i>                                  | <i>Amount Collected</i> | <i>No. of Cases</i> |
|--|-------------------------|---------------------|
| Mental Health                                      | \$95,597.70             | 96                  |
| Public Health                                      | 193,902.13              | 231                 |
| Public Works                                       | 26,445.05               | 166                 |
| Metropolitan District Commission                   | 7,191.52                | 25                  |
| Public Safety                                      | 2,284.00                | 254                 |
| Adjutant General                                   | 375.60                  | 1                   |
| Department of Commerce                             | 2.10                    | 1                   |
| Department of Correction                           | 145.82                  | 6                   |
| Department of Education                            | 613.50                  | 8                   |
| Department of Education —<br>Division of the Blind | 54.70                   | 3                   |

| <i>Department</i>                | <i>Amount Collected</i> | <i>No. of Cases</i> |
|----------------------------------|-------------------------|---------------------|
| Department of Labor and Industry | 352.37                  | 1                   |
| Department of Public Utilities   | 300.00                  | 1                   |
| Department of Public Welfare     | 200.00                  | 1                   |
| Department of Natural Resources  | 956.09                  | 6                   |
| Division of Employment Security  | 91.55                   | 1                   |
| Division of Youth Service        | 161.85                  | 1                   |
| Massachusetts Port Authority     | 2,796.43                | 4                   |
| Parole Board                     | 278.04                  | 3                   |
| Soldiers' Home                   | 140.87                  | 2                   |
| Treasury Department              | 3,387.84                | 1                   |
| Veterans' Services               | 10.00                   | 1                   |
| University of Massachusetts      | 873.31                  | 34                  |
|                                  | <hr/> \$336,160.47      | <hr/> 847           |

There has been, it should be noted, a significant increase in the sums collected for the Commonwealth in this area since this administration took office in January of 1963. The aforementioned \$336,160.47 which represents this administration's first full fiscal year in office and the comparative figures below tell the story.

Statistics as to amount of collection by this Division in past years and in 1964:

| <i>Fiscal Year Ending</i> | <i>Amount Collected</i> |
|---------------------------|-------------------------|
| June 30, 1958             | \$123,925.65            |
| June 30, 1959             | 95,000.00               |
| June 30, 1960             | 113,439.15              |
| June 30, 1961             | 127,776.41              |
| June 30, 1962             | 118,919.61              |
| June 30, 1963             | 225,078.93              |
| June 30, 1964             | 334,160.47              |

### Veterans' Division

It is the responsibility of the Veterans' Division to advise Massachusetts veterans of their rights and duties under Massachusetts and Federal law. The Division furnishes legal assistance to veterans and to members of their families. It helps to guide veterans in the securing of the many special services, local, state and federal, available to them. The Veterans' Division is available at all times to help veterans resolve any problems that may arise in this regard and the time of the Division is expended unstintingly in an effort to provide this service.

Many inquiries have continued to be directed to the Division from veterans and their dependents, especially concerning tax problems.

This Division is called upon to hold frequent conferences with other state agencies and with local tax officials. Once again, we are most pleased to note our gratitude for the excellent cooperation received from the Commissioner of Veterans' Services and from his entire staff.

## Springfield and Worcester Offices

The responsibilities of the Department of the Attorney General extend throughout the Commonwealth. Many of the wide-ranging tasks of the office can be handled efficiently and satisfactorily from the central Boston location. But to provide maximum accessibility to and understanding of local problems, regional offices in Springfield and in Worcester are essential.

Two Assistant Attorneys General and a Legal Assistant are at the service of the citizens of the Springfield area. Available to the residents of the Worcester community are an Assistant Attorney General and a Legal Assistant. In addition, Special Assistant Attorneys General have been appointed from time to time to augment the regular staff in the resolution of specific legal problems.

The attorneys in these offices have devoted the bulk of their time during the past fiscal year to handling land damage cases. But they have also been active in processing and preparing motor tort and industrial accident claims.

But the primary value which these regional offices provide is service to each and every citizen. By being readily available to assist with *all* problems and complaints the office of the Attorney General fulfills its most useful function: — serving as the people's attorney.

## Conclusion

The preceding division reports provide only a synopsis and summary of the manifold responsibilities and actions which the members of the staff have undertaken in the last year.

They have carried the heaviest work load in the history of the Department of the Attorney General. And they have worked with tireless dedication and great skill at each and every assignment. They have been "the people's attorneys" in the best sense of that phrase and it has been an honor and a privilege for me to have worked with them.

Respectfully submitted,

EDWARD W. BROOKE,

*Attorney General*



*A disabled veteran on an eligible list for a State position must be appointed, if able, although he also holds a non-conflicting municipal civil service position.*

JULY 8, 1963.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have requested an opinion as to the effect of the provision of the Civil Service Law requiring the appointment of a disabled veteran on an eligible list in preference to all others.

It appears that a disabled veteran who has been certified for appointment to the Commission by the Division of Civil Service and who has, in fact, been employed by the Commission since October 27, 1961, on a full-time, but temporary, basis in the position for which he has been certified, also holds, and has continuously held during the period of his employment with the Commission, a permanent position under civil service with the City of Boston. The disabled veteran is willing to accept appointment by the Commission but if appointed intends to continue his service with the City of Boston.

You ask, in effect, whether in the circumstances and despite the statute requiring the appointment of a disabled veteran who is on an eligible list in the preference of all others, the Commission can appoint a person on the eligible list who is not a disabled veteran.

The disabled veteran you refer to apparently has, as required by G.L., c. 31, § 23A, presented a certificate of a physician approved by the Director of Civil Service that his disability is not such as to prevent the efficient performance of the duties of the position to which he is eligible. It is stated in the correspondence you enclosed with your request that the hours of duty of the person in question with the Commission and the city have not conflicted and that if he is appointed permanently with the Commission, there will be no conflict.

Also, it appears that his sick leave record with the Commission indicates no excessive sick leave has been taken as a result of holding the two positions and that while the Commission desires to appoint some person on the list other than the disabled veteran on a permanent basis it would continue to employ the disabled veteran on a full-time, but temporary, basis.

General Laws c. 31, § 23 provides in part that "A disabled veteran shall be appointed and employed in preference to all other persons including veterans."

In view of the explicit provision quoted, I am constrained to the opinion that the Division of Civil Service cannot permit the appointment of anyone other than a disabled veteran when a disabled person is on an eligible list for a position.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A municipality accepting the statute permitting group insurance coverage of persons retired prior to the date of a contract therefor, may include a retired employee receiving an annuity as the spouse of an employee.*

JULY 8, 1963.

MR. WILLIAM A. BURKE, *Executive Secretary, Group Insurance Commission.*

DEAR SIR: — You have requested my opinion as to the applicability of Chapter 647 of the Acts of 1962 to Mary V. Kelley, a former employee of the Town of Brookline.

Specifically, you have asked whether she is eligible to secure hospital-surgical-medical coverage under said chapter.

Mary V. Kelley was retired by the Brookline Retirement Board in 1952 at an annual rate of \$356.40. Chapters 32A and 32B had not yet been enacted and, therefore, it would have been impossible to secure the hospital-surgical-medical coverage at this time. Chapter 647 of the Acts of 1962 was enacted to make this insurance available to "elderly governmental retirees . . . retired prior to the effective date of contracts or agreements issued under the provisions of chapter thirty-two B as, or when, adopted by the political subdivision from which they are retired, and who are receiving a pension, annuity or retirement allowance sufficient from which a monthly insurance premium may be withheld."

In 1963 the Town of Brookline adopted Chapter 647 of the Acts of 1962 but at the same time granted an annuity to survivors of deceased officials or employees who died or were retired under the provisions of c. 32, § 95A. Mrs. Kelly qualified and thus waived her own pension so as to be eligible for the annuity.

It is my opinion that Mary V. Kelley is eligible to secure hospital-surgical-medical insurance coverage under Chapter 647 of the Acts of 1962, since the Town of Brookline has adopted said chapter and because she retired prior to the enactment of c. 32B and is receiving an annuity from the Town of Brookline sufficient from which a monthly insurance premium may be withheld.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The office of Director of Personnel and Standardization was abolished by St. 1962, c. 757, and the incumbent thereof was not transferred to the specific newly created office with the same title, which is vacant.*

JULY 8, 1963.

HON. WILLIAM A. WALDRON, *Commissioner of Administration and Finance.*

DEAR SIR: — In your letter of April 26, 1963 you have requested my opinion as to whether, under Chapter 757 of the Acts of 1962, a vacancy exists in the office of Director of Personnel and Standardization in the new Executive Office for Administration and Finance.

The former Commission of Administration and Finance was created under the Acts of 1922, c. 545 which became a part of Mass. Gen. Laws c. 7.

Mass. Gen. Laws c. 7, section 2.

There shall be a commission on administration and finance consisting of four commissioners, which shall serve directly under the governor and council within the meaning of Article LXVI of the amendments to the constitution of the Commonwealth.

Under the provisions of such chapter, one of the commissioners was designated the chairman of the commission and served in the capacity of Commissioner of Administration.

Mass. Gen. Laws c. 7, section 3.

One commissioner shall be appointed by the governor, with the advice and consent of the council, as chairman of the commission, and he shall serve a term of office concurrent with that of the governor. Said commissioner shall be designated and be known as the commissioner of administration . . .

Under the then administrative organization of the commission, the Director of Personnel and Standardization was placed directly under the commission.

Mass. Gen. Laws c. 7, section 5.

There shall be directly under the commission a division of personnel and standardization, in charge of a director of personnel and standardization.

Chapter 757 of the Acts of 1962 abolished the Commission on Administration and Finance [c. 757, section 74 (1962)]. A new agency was created called the Executive Office for Administration and Finance. This change became effective as of January 3, 1963. The legislature did this by striking out sections 2, 3, 3A, 4, 5, 5A, 5B, and 6, of chapter 7 of the Massachusetts General Laws, and inserting in their place nine new sections.

Mass. Gen. Laws c. 7, section 2 (as amended).

There is hereby established the executive office for administration and finance, which shall serve directly under the governor and council within the meaning of Article LXVI of the constitution of the commonwealth. Unlike the old provisions of chapter 7, the governor may now appoint the Commissioner of Administration without the advice and consent of the council and may remove him at will.

Mass. Gen. Laws c. 7, section 4 (as amended).

The governor shall appoint a commissioner of administration, who shall be a person of ability and experience. He shall serve at the pleasure of the governor, shall receive such salary not exceeding fourteen thousand dollars per year as the governor may determine, and shall devote his entire time to the duties of his office. Except in the cases of the comptroller's division and the purchasing agent's division, each as established under section four A, the commissioner shall be responsible for the exercise of all powers and the performance of all duties assigned by law to the

executive office for administration and finance or to any division, bureau or other administrative unit or agency under the said office. He shall be the executive and administrative head of the said office; and every division, bureau, section and other administrative unit and agency within the said office, other than the comptroller's division and the purchasing agent's division, shall be under his direction, control and supervision . . .

Under the new organization created by c. 757 (1962), the Director of Personnel and Standardization is no longer directly under the Commission. The Executive Office for Administration and Finance is comprised of four divisions: the comptroller's division, the purchasing agent's division, the fiscal affairs division and the central services division. In two of these divisions, fiscal affairs and central services, the Commissioner of Administration enjoys broad inter-departmental reorganization powers. (Mass. Gen. Laws c. 7, section 4A, as amended.) The legislature granted the commissioner broad powers not theretofore in existence and the fiscal affairs division, under whose jurisdiction the Bureau of Personnel is now situated, is not an excepted division from those powers as set forth in section 4 of the reorganization act.

The new Bureau of Personnel and Standardization is now directly under the Fiscal Affairs Division rather than under the Commission. Also, c. 757 (1962) has added new qualifications for the office of Director not present in the old statute.

Mass. Gen. Laws c. 7, section 4B.

There shall be within the fiscal affairs division a . . . bureau of personnel headed by a director of personnel and standardization . . . The said director of personnel and standardization shall . . . be appointed by the commissioner, with the approval of the governor and council, and may be removed, for cause, in like manner; shall be a person of ability and experience, and shall devote his entire time to the duties of his office; and none of the said officers shall be classified under chapter thirty-one.

The legislature, in abolishing the Commission on Administration and Finance, also specifically abolished the old office of Director of Personnel and Standardization, formerly authorized by section 5 of chapter 7, in enacting section 4 of the new act which recites:

Said chapter 7 is hereby amended by striking out sections 2, 3, 3A, 4, 5, 5A, 5B and 6, and inserting in place thereof . . .

This section also abolished the old offices of Federal-State co-ordinator, comptroller's bureau, budget bureau, purchasing bureau, division of building construction and the two deputy commissioners of administration.

The legislature, being mindful that it had abolished these offices, provided for continuity of the commission and its departments by establishing in sections 2, 3, 4, 4A, 4B and 4C the new Executive Office for Administration and Finance with the necessary and appropriate divisions and bureaus thereunder.

In respect to the offices of Comptroller, state purchasing agent, state superintendent of buildings, budget commissioner and director of hospital costs, the incumbents were continued in office by section 72 of the new act which provides:

Notwithstanding the provisions of section three of this act, the incumbents of the offices of comptroller, state purchasing agent and state superintendent of buildings immediately prior to the effective date of this act shall continue to serve as comptroller, state purchasing agent and state superintendent of buildings, respectively, until expiration of the term for which he shall have been appointed; and the incumbent of the office of budget commissioner shall, until expiration of, the term for which he shall have been appointed, serve as the budget director established by the act; and such incumbent of the office of director of hospital costs, shall continue his office in accordance with his appointment under chapter thirty-one.

It is to be noted that the incumbent of the office of Director of Personnel and Standardization was not included in this section although the new office had been provided for in section 4B of the act.

In addition to authorizing the specific transfers set forth in section 72, the legislature also adopted section 73, which reads as follows:

c. 757, section 73 (1962).

All officers, deputies and employees of any board, office, agency, division, bureau, section or other administrative unit within, under or attached to the commission on administration and finance and the office of the state superintendent of buildings who immediately prior to the effective date of this act shall hold positions classified under chapter thirty-one of the General Laws, or shall have tenure in their positions by reason of section nine A of chapter thirty of the General Laws are hereby transferred to the services of the divisions, bureaus, sections and other administrative units within the executive office for administration and finance which are established by this act or shall be established in accordance with this act, every such transfer to be without impairment of the civil service status, seniority, retirement and other rights of the employee, without interruption of his service within the meaning of the said chapter thirty-one or section nine A of chapter thirty, and without reduction in his compensation and salary grade, notwithstanding any change in his title or duties made as a result of such transfer. All officers, deputies and employees of any such board, office, agency, division, bureau, section or other administrative unit who immediately prior to the said date shall, without such tenure, hold positions not so classified, are hereby transferred to the service of the said executive office for administration and finance without impairment of seniority, retirement, and other rights, without interruption of service within the meaning of the said section nine A of chapter thirty, and without reduction in compensation and salary grade.

Section 73 provides for transfer of the following three groups of employees:

1. Employees holding civil service positions classified under c. 31;
2. Employees having veterans tenure under c. 30, section 9A.
3. All other officers, deputies and employees not holding positions so classified and not having such tenure.

The transfers authorized by said section 73 are not to specific positions (as is the case with section 72 appointments) but are "to the services of the divisions, bureaus, sections and other administrative units within the executive office for administration and finance . . ." The strong control and reorganization powers granted to the Commissioner by the new act indicate that the legislature did not intend to limit his discretionary disposition of forces within his organization, except as specifically enumerated by the legislature.

If the legislature had intended that the incumbent of the office of Director of Personnel and Standardization was to be transferred to a new position bearing the same title under the new act, it can be assumed that the legislature would either have spelled it out as in the case of the section 72 appointments or would have used apt language to express its intention as it did in a somewhat similar situation under section 22 of Chapter 465 of the Acts of 1956 wherein it stated: ". . . the employees of said projects whose work is directly related to such projects, shall be transferred to the Authority and shall continue to perform the same duties at a salary not less than theretofore . . ."

Not having been specifically singled out for transfer to a specific position by either sections 72 or 73, it follows that the incumbent's rights to transfer to such specific position are dependent upon whether or not he has status as a civil service employee or as a veteran.

The Director of Personnel and Standardization could not be classified as a civil service employee under Chapter 31 since appointments to that office are subject to the approval of the governor and council.

Mass. Gen. Laws c. 31, section 5.

#### *Positions Not to Be Included.*

No rule made by the commission shall apply to the selection or appointment of any of the following: — . . . officers whose appointment is subject to the approval of the governor and council . . .

Whether or not the incumbent is covered by c. 30, section 9A is determined by the length of time he has held the position of Director of Personnel and Standardization. From the facts on file in the Office of the Secretary of State, the appointment of the incumbent Director of Personnel and Standardization was confirmed December 28, 1960, and he took the oath of office on December 29, 1960. Since he has not been in office for the statutory period of three years, he does not come within the purview of Mass. Gen. Laws c. 30, section 9A.

Mass. Gen. Laws c. 30, section 9A.

A veteran, as defined in section twenty-one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office, an appointive office for a fixed term or an office or position under section seven of this chapter, and *has held such office or position for not less than three years . . .* (Emphasis supplied.)

The fact that the incumbent has performed the duties of the Director of Personnel and Standardization does not vitiate the effect of the statutes

cited above. His continuance in office can give him no new tenure. Our Supreme Judicial Court, commenting on a similar situation, stated:

"It is a general principle of expediency in the absence of any binding regulation that an officer may continue after the expiration of his term to exercise the duties of his position until his successor is selected and qualified. This is simply a holding over for convenience and confers no right for any defined period. It is not a part of the necessary tenure of his office. It prevents interruption in the performance of the public business . . ." *Opinion of the Justices*, 275 Mass. 575, 579 (1931).

It is clear that the legislature had the power to abolish the old office and create the new.

"The legislature may create a public office, other than one created by the constitution, provide for the election or appointment of its incumbent, establish and modify from time to time its tenure, compensation and duties, and abolish the office as the public interest may require." *Cullen vs. Mayor of Newton*, 308 Mass. 578, 580 (1941).

"Where an office is created by law, and one not contemplated, nor its tenure declared by the constitution, but created by law solely for the public benefit, it may be regulated, limited, enlarged or terminated by law, as public exigency or policy may require." *Taft vs. Adams*, 3 Gray 126, 130 (1854).

Based upon the facts that under c. 757 of the Acts of 1962 the legislature (a) abolished the former office of Director of Personnel and Standardization, (b) created a new office, bearing the same title, which fits differently into the organizational structure of the new Executive Office for Administration and Finance, (c) granted the new Commissioner broad and flexible powers of administration, and (d) spelled out the positions under which transfers to the new agency were mandatory and in so doing failed to include the office of Director of Personnel and Standardization, it is my opinion that a vacancy exists in the office of Director of Personnel and Standardization in the New Executive Office for Administration and Finance.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Ordinarily the Attorney General gives opinions only to State officers. In view of state-wide concern, opinions expressed that statute requiring the reading of the Bible in the public schools is unconstitutional in view of recent decisions of the Supreme Court of the United States.*

JULY 9, 1963.

MR. EDWARD J. WINTER, *Secretary, The School Committee of the City of Boston*.

DEAR SIR: — In your letter to me of July 2, 1963, written on behalf of the School Committee, you request my opinion of the effect of the recent decision of the Supreme Court of the United States "on Bible reading and other religious exercises or ceremonies in the Boston Public Schools."

Normally, the answer to a request of such nature would be furnished to a local school committee by its corporation counsel, city solicitor or town counsel, as the case may be. Except as otherwise provided by statute, the legal opinions of this office are rendered only to the Governor and Council, the legislature and the various departments of our state government.

Nevertheless, in view of the time limitation suggested in your letter and because the underlying question involves matters applicable to every city and town in the commonwealth, I have formulated the opinion which follows.

On June 17, 1963, the Supreme Court of the United States decided, in a single opinion, *School District of Abington Township v. Schempp* (No. 142) and *Murray v. Curlett* (No. 119). In *Schempp*, the Court considered the constitutionality of a Pennsylvania statute, which read as follows:

"At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." 24 Pa. Stat. section 15-1516, as amended.

In *Murray*, the Court considered the validity of a Baltimore ordinance of like effect.

The Court reaffirmed the doctrine — of some twenty years' standing — that those restraints on the power of the Federal government imposed by the First Amendment also apply to the states through the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U. S. 296. These restraints prevent all governments — federal, state or local — from passing laws which "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education*, 330 U. S. 1, 15. See also *Engel v. Vitale*, 370 U. S. 421; *Torasco v. Watkins*, 367 U. S. 488; *McGowan v. Maryland*, 366 U. S. 420.

G.L., ch. 71, section 31, reads as follows:

"A portion of the Bible shall be read daily in the public schools, without written note or oral comment; but a pupil whose parent or guardian informs the teacher in writing that he has conscientious scruples against it, shall not be required to read from any particular version, or to take any personal part in the reading. The school committee shall not purchase or use in the public schools school books favoring the tenets of any particular religious sect."

It is apparent that section 31 is indistinguishable from the Pennsylvania statute invalidated in *Schempp*. Section 31 calls for the same type of ceremonial recitation in the public schools as did the Pennsylvania statute. Accordingly, under the principles enunciated by the Supreme Court, section 31 is unconstitutional, utterly void and without any force or effect, without the necessity of formal repeal.

We are a nation of laws and not of men. Respect for and obedience to the law has been a hallmark of our history. We may, as individuals or as members of a larger association of citizens, disagree with a decision made by the Supreme Court of the United States. But when the Supreme Court of the United States has ruled that a state statute is in conflict with our federal constitution, every American — the public official and the



private citizen alike — has a duty to abide by that decision. To do otherwise would undermine the very foundations on which this country was built.

You also referred in your letter to "other religious exercises or ceremonies in the Boston Public Schools." You have not indicated the nature of any other "religious exercises or ceremonies" which may be practiced in the Boston schools; and I have not been made aware of any which are uniformly practiced throughout the Commonwealth. Whether any such exercises or ceremonies would be valid under the principles of the First Amendment, or of applicable laws of the Commonwealth, would obviously depend upon the facts. Not having been given any such facts, I cannot attempt to express an opinion on the effect thereon of such principles, and accordingly cannot further answer your request. When and if the question is appropriately presented, it will receive my fullest attention.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Civil Service Commission has no jurisdiction to review the suspension of a civil servant indicted for misconduct in his employment.*

JULY 10, 1963.

HON. JOHN C. CARR, JR., *Chairman, Civil Service Commission*.

DEAR SIR: — In your letter of July 10, 1963, you have asked my opinion as to whether the Civil Service Commission has the authority to hear the complaint of a civil servant suspended under the provisions of St. 1962, c. 798.

The facts as stated in your letter are as follows:

"Mr. Bessette is currently under indictment by the Suffolk County Grand Jury and has been convicted of the crime of conspiracy. He has appealed his conviction to the Supreme Judicial Court where his appeal is now pending.

"After Mr. Bessette was indicted, Mr. Jack P. Ricciardi, the Commissioner of Public Works, suspended Mr. Bessette from the position of Director of the Division of Waterways in accordance with St. 1962, c. 798.

"Mr. Bessette in his complaint contends that he has been illegally suspended by the Commissioner of Public Works. It is his contention that he could only be suspended by the procedures outlined in Mass. G.L., c. 31, § 43."

Massachusetts General Laws c. 31 deals generally with the rights and privileges of employees having civil service status. Section 43 of this chapter deals with a procedure by which a civil servant may be suspended.

Mass. Gen. Laws c. 31, § 43.

"(a) . . . He shall not be discharged, removed, suspended for a period exceeding five days, laid off, transferred from such office or employment without his consent, lowered in rank or compensation, nor shall his office

or position be abolished, except for just cause and for reasons specifically given him in writing. . . ."

This section was most recently amended by St. 1959, c. 569, §1. It speaks only in general terms of the suspension of a civil servant. It does not exclude the suspension of a civil servant for a cause or by a procedure specifically provided for by the Legislature to meet a precise situation.

That situation is where an employee of the Commonwealth has been indicted for misconduct in office. The Legislature (St. 1962, c. 798) provided specifically for this situation. I call your attention to my opinion dated June 26, 1963 relative to this recent enactment which holds, *inter alia*, that the Legislature comprehended a subsequent conviction under the indictment as contemplated by the statute. Enclosed you will find a copy of my opinion for your convenience. Any general provision of the law which might apply to this situation has been superseded by this specific statute.

It is a familiar rule of statutory interpretation that a specific provision will govern even though general provisions, if standing alone, would include the same subject. *Karrell v. United States*, 181 F2d 981, 986 (9th Cir. 1950).

It is the established law that where two statutes cannot be otherwise reconciled, the general statute must yield to the specific statute, particularly where the specific statute is a later one. *Papiernick v. City of New York*, 115 N.Y.S. 2d 454, 458 (1952).

Where there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates only to one subject, the particular provision must prevail and must be treated as an exception to the general provision, especially where the particular provision is later in time enactment. *Bowes v. City of Chicago*, 120 N.E. 2d 15, 31 (1954).

This statute provides an exclusive procedure. Massachusetts General Laws c. 31, § 43 does not apply where a civil servant has been suspended for being "under indictment for misconduct in his office or employment of the commonwealth." The Civil Service Commission then would not have jurisdiction to hear this case since their reviewing authority under Mass. General Laws c. 31, § 46A is predicated on the basis that Massachusetts General Laws c. 31, § 43 has been inapplicable.

The rights of the employee are fully protected under St. 1962, c. 798. If the indictment is found by the Court to be without justification, the employee is restored to all his rights and privileges without loss of compensation. Further, if the appointing authority failed to restore the employee to his former position, an action based on this statute could be brought in the courts.

Therefore, it is my considered opinion that the Civil Service Commission lacks the authority or jurisdiction to hear the complaint of Mr. Besette.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The 1963 statute fixing the compensation of the legislators is not excluded from the Referendum as an appropriation; but since it is an Emergency Law its suspension cannot be requested.*

JULY 11, 1963.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth.*

DEAR SIR: — I have your request dated July 9, 1963 relative to my opinion on the constitutional sufficiency of two referendum petitions calling for the repeal and suspension of St. 1963, c. 506, being a legislative enactment entitled "AN ACT FURTHER REGULATING THE COMPENSATION, TRAVEL ALLOWANCE AND EXPENSES OF THE MEMBERS OF THE GENERAL COURT."

You have asked three distinct questions and I shall reply as enumerated.

"1. *Is the subject matter embodied in the petitions within the excluded matters for referendum as contained in the Constitution?*"

The exclusion section of amended Article 48 of the Amendments to the Constitution reads as follows:

"No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition."

In the recent case of *Daniel F. Murray v. Secretary of the Commonwealth, et al.*, 184 N.E.2d 336, 339, 1962 Adv. Sh. 1299, 1303, wherein the Court treated with the last legislative pay raise, St. 1960, c. 783, Chief Justice Wilkins stated therein "We are of opinion that, viewed by itself, St. 1960, c. 783, merely fixed salaries and did not appropriate funds for their payment. . . ." The Chief Justice also quoted the *Opinion of the Justices*, 301 Mass. 571, 587, to the effect that, "A provision . . . fixing the salary of a public officer is not an appropriation of that amount for the payment of such salary." The statute treated with herein is not unlike St. 1960, c. 783.

It is, therefore, my considered opinion that the subject matter embodied in the petitions filed with your office does not fall within the excluded matters for referendum as contained in amended Article 48 of the Constitution.

"2. *In the case of the petition numbered 2, which in addition to repeal, requests the suspension of the above Chapter 506, to which an emergency preamble has been affixed by the Legislature, does the Constitution make provision for the suspension of an emergency law, under Article 48?*"

The constitutional provision for legislative enactment of emergency measures is found in amended Article 48 "The Referendum", "II. Emergency Measures" which provides in part:

"A law declared to be an emergency law shall contain a preamble setting forth the facts constituting the emergency, and shall contain the statement that such law is necessary for the immediate preservation of the public peace, health, safety or convenience. A separate vote, which shall be recorded, shall be taken on the preamble, and unless the preamble is adopted by two-thirds of the members of each House voting thereon, the law shall not be an emergency law. . . ."

The enactment of legislation containing an emergency preamble renders the bill effective forthwith. The constitutional authority granted to the Legislature to enact emergency measures necessarily carries with it the power to enact legislation deemed by that body to be of such importance as to affix thereto an emergency preamble. Such authority far exceeds the weight given to an ordinary law which, when enacted, does not take effect for ninety days.

Amended Article 48, III. Referendum Petitions, Section 3 of the Constitution entitled "Mode of Petitioning for the Suspension of a Law and a Referendum Thereon.", does not specifically provide for the suspension by referendum petition of an emergency law. Whereas, Section 4 thereof provides: "A referendum petition may ask for *the repeal of an emergency law*. . . ."

The framing of our Constitution, and particularly an amendment thereto, must be presumed to have been accomplished only after profound thought, research and study. It is manifest and apparent that the silence of Section 3 of Amended Article 48 relative to suspension of emergency laws carries considerable significance when one does find the specific provision for repeal of emergency laws in Section 4 of Amended Article 48. Where the intention is clear, there is no room for constitutional construction and no excuse for interpolation or addition.

Our Justices stated in *Opinion of the Justices to the Senate*, 286 Mass. 611, 626, "The very presence in Article 48 of the reservation to the General Court of power to enact emergency measures imports competency to enact laws with respect to matters of high importance which override the inchoate and incomplete law of an ordinary nature. . . ."

You have not raised the question, nor may I properly treat with herein, the validity or invalidity of the General Court's judgment in affixing the emergency preamble to a measure concerning the subject matter of legislative compensation.

I, therefore, answer your second inquiry in the negative.

"3. *For inclusion on the petitions for subsequent signers, will you kindly provide a concise summary of the provisions of the referenda as soon as possible.*"

Inasmuch as I have answered your second inquiry in the negative, your request for a concise summary of the proposed law, repeal of which is sight by referendum petition, will follow under separate cover.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*A contractor with the Metropolitan District Commission on a "unit price" sewer contract has no claim for the cost of pipe not used, and the pipe cannot be paid for as "extra work" or purchased, under the contract, by the Commission.*

JULY 12, 1963.

HON. ROBERT F. MURPHY, *Commissioner Metropolitan District Commission.*

DEAR SIR: — You have requested an opinion as to the proper method of payment under M.D.C. Contract 273 for 21 linear feet of unused pipe.

Your letter states that this length of pipe was not installed as expected because of a change in the topography of the area. You further state that the contractor has made claim for payment for the pipe and that the Commission believes this pipe could be of possible use in the future for extension or repair.

Contract 273 provides for the construction of approximately five thousand, four hundred and fifty-four (5,454) linear feet of out-fall sewer.

The contractor has no claim for damages if, at the completion of the work as directed, he has remaining a quantity of uninstalled pipe.

The contractor agreed to accept as full compensation the unit prices incorporated into the contract (*Proposal for Contract 273*, page 16; Article II, *Work to be Done by Contractor*, page 44.) Under the pertinent terms of this contract, the contractor shall be paid at the rate of \$320 per linear foot for pipe "satisfactorily built into place in the completed work." (Item 19, page 23; Section 14.14, *Measurement and Payment*, p. 92.) See also Section 14.1, *Work Included*, p. 85.

The contract is replete with warnings to the contractor that the quantities estimated by the Commonwealth were only approximations and not to be the basis of any claims for damages.

#### *Advertisement for Bids.*

" . . . The work to be done under this contract consists of constructing *approximately* five thousand four hundred and fifty-four (5,454) linear feet of outfall sewer. . . ." Page 1.

#### *Approximate Statement of Quantities.*

"The following quantities are *approximate* only. . . ." Page 5.

#### *8. Conditions of Work.*

" . . . Each bidder will form his own opinion of the character of the material to be excavated . . . and must satisfy himself by his own investigation and research regarding all conditions affecting work to be done and labor and materials needed and make his bid in sole reliance thereon.

"The quantities listed in the proposal are approximate only, being given for use in the comparison of bids and the Commission reserves the right to increase or decrease the amount of work to be done under any of these items, as may be deemed necessary or expedient by the Engineer. The Commission does not expressly or by implication agree that the actual amount of any portion of the work will correspond with the quantities listed in the Proposal." Page 11.

"The undersigned (Contractor) agrees that he will accept the above-stated unit prices as full payment under the items opposite which they are respectively set whether or not the actual amount of work under any or all of the items corresponds with the estimated quantities shown on the contract plans or in his proposal under any or all of the items, it being expressly understood that these quantities are approximate only, that they are uncertain and cannot be predicted in advance and that the work under certain items may be materially greater than or less than indicated as may be necessary, in the judgment of the Engineer, to complete the work contemplated in the contract. . . ." Page 37. (See also *General Description of the Work*, page 46, para. 2.)

The contract further provides that if the Engineer makes any alterations in the work to be done "the Contractor shall have no claim for damages or for anticipated profits on the work that thus may be dispensed with". (Article XVII, Alterations, page 191.) See also *Compensation for Work*, Article XXIII, page 197.

The courts have consistently upheld provisions of this type and denied damages to contractors.

*Allen v. Melrose*, 184 Mass. 1. 5.

*Bay State Dredging & Contracting Co. v. South Essex Sewerage District*, 279 Mass. 158, 162.

*Veneto v. McCloskey & Co.*, 333 Mass. 95, 101.

*United States v. Spearin*, 248 U.S. 132.

This contract does not give the authority to pay for or purchase pipe for "possible use in the future for extension or repair of the line". The terms of this contract are limited to the construction of a sewer line. There are no provisions in the contract for subsequent repair or extension of the line.

Furthermore, Article XVIII (Extra Work) does not provide a method of payment for this pipe, however advantageous this may appear. This article provides a method of payment for: "any work not herein otherwise provided for and as ordered in writing by the Engineer or his agent. . . ." Page 192.

Selling unused pipe can hardly be considered "work". The provisions of this article following the above-cited quotation demonstrate its inappropriateness:

"The cost of extra work shall not include any general or indirect overhead charges except that there shall be included an allowance, equal to the actual amount paid, for Public Liability, Performance Bond, Property Damage and Workmen's Compensation Insurance, and Federal Social Security and Massachusetts Unemployment Acts. . . ." Page 192.

Therefore, Contract #273 neither authorizes nor provides a method for purchasing this unused pipe, and any attempt to do so under the contract, even if done in good faith, would be subject to being avoided by the Court.

*Morse v. Boston*, 253 Mass. 247.

*Very truly yours,*

EDWARD W. BROOKE, *Attorney General*.

*The deposit of material in the dredging area by a hurricane is an Act of God, and the Contractor is not entitled to compensation, at the unit price, for its removal.*

JULY 16, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

*Re: Edgartown-Oak Bluffs Contract No. 2287, Ercon Const. Corp.*

DEAR SIR: — You have requested an opinion as to whether the deposit of approximately 3,000 cubic yards of material, in the dredging area shown in the contract plan by Hurricane Donna is such an act of God as would entitle the Department of Public Works to pay the contractor on the basis of the unit bid price for the removal of such material.

The following portion of Article 60 of the Standard Specifications for Waterways drawn up by your Department is pertinent:

“Until its final approval by the Party of the First Part, the contractor shall assume full charge and care of the work and shall take every necessary precaution against injury or damage to the work by action of the elements.”

Article 74 is also pertinent in that an act of God and unforeseeable causes will only allow an extension of contract time for completion and nothing more. Section D of said article reads as follows:

“When delay occurs due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to acts of God, acts of the public enemy, acts of the Government, acts of the State or any political subdivision thereof, acts of other contracting parties over whose acts the Contractor has no control, fires, floods, epidemics, strikes except those caused by improper acts or omissions of the Contractor, extraordinary delays in delivery of materials caused by strikes, lockouts, wrecks, freight embargoes, or acts of God, the time for completion of work shall be extended in whatever amount is determined to be equitable.

“An act of God is construed to mean an earthquake, flood, cloudburst, cyclone, or other cataclysmic phenomenon of nature beyond the power of the Contractor to foresee or make preparation in defense of. A rain, windstorm or other natural phenomenon of normal intensity, based on United States Weather Bureau reports, for the particular locality and for the particular season of the year in which the work is being prosecuted shall not be construed as an “act of God” and no extension of time will be granted for the delays resulting therefrom.

“Within the scope of acts of the Government, consideration will be given to properly documented evidence that the Contractor has been delayed in obtaining any material or class of labor because of any assignment of preference ratings by the Federal Government or its agencies to War, Navy or other defense contracts.

“No extension of time will be granted for any delay or any suspension of the work due to the fault of the Contractor, nor if a request for an extension of time on account of delay due to unforeseeable causes is not filed within fifteen (15) days of the date of the termination of the delay.”

The answer to the above question has been set forth in *Boyle v. The Agawam Canal Co.*, 22 Pickering 381. In that land-mark case, it was held that the contractor was not entitled to recover for extra labor of repairing portions of the embankment and excavation, which was washed away or filled up by floods before the work was completed. The court said:

"The general rule undoubtedly is, that in cases of contracts for construction of an entire work at a stipulated sum to be paid by the same, if any casualty shall occur, which shall increase the labors and expenditures of the contractor, the loss must fall on him who engages to do the work."

The case of *Adams v. Nichols*, 36 Mass. 275 establishes the same principle. There a person contracted to build a house on the land of another and the house was, before its completion, destroyed by fire, it was held that the contractor was not discharged by his obligation. The court stated:

"It is, that where the law imposes a duty upon anyone, inevitable accident may excuse the non-performance, for the law will not require of a party what, without his fault of his, he becomes unable to perform. But where the party by his agreement voluntarily assumes or creates a duty or charge upon himself, he shall be bound by his contract, and the non-performance of it will not be excused by accident or inevitable necessity; for if he desired any such exception, he should have provided for it in his contract."

On the bases of the foregoing specifications and cited cases, your question must be answered in the negative. The contractor is not entitled to be paid for the removal of such material.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Legislation to authorize the use of land given to the Commonwealth for a wild-life sanctuary, as a ski area by a private group, would be unconstitutional.*

JULY 23, 1963.

MR. FRANCIS W. SARGENT, *Director, Division of Fisheries and Game*.

DEAR SIR: — In your letter of May 10, 1963, you have asked my opinion concerning proposed legislation which would authorize the Director of the Division of Fisheries and Game, with the approval of the Governor and Council, to grant an easement to a private group or corporation for use as a ski area over land conveyed to the Commonwealth as a wild-life sanctuary.

The facts which you have outlined are as follows:

"The Commonwealth of Massachusetts received, as a gift, from the Federation of Bird Clubs of New England, Inc., a parcel of land containing 100 acres more or less situated in Ashby and Ashburnham.

"This land was conveyed as a wild-life sanctuary under the provisions of Chapter 131, Sec. 69 of the General Laws as amended by Statute of 1923, Chapter 301, Sec. 1.



"The deed to the Commonwealth from the Federation of Bird Clubs of New England, Inc., contains in addition to the description of the boundaries, etc., the following clause;

"Said premises are conveyed for use as a wild-life sanctuary for all time, for the purposes of Chapter 131, Section 69 of the General Laws, as amended by Statute of 1923, Chapter 301, Section 1."

"This deed was dated May 4, 1926 and was accepted, after approval of the Governor and Council on December 15, 1926. It was recorded in Worcester Northern District Deeds Book 444, Page 344 on Jan. 18, 1927 and also in Middlesex South District Deeds Book 5063, page 95 on February 4, 1927.

"The Division does not have authority, without legislative approval, to sell, lease or otherwise dispose of property under its jurisdiction."

Massachusetts General Laws c. 131, § 69 was revised by St. 1941, c. 599 and now appears as Mass. General Laws c. 131, § 90.

Mass. Gen. Laws c. 131, § 90:

"For the purpose of protecting any species of useful birds, mammals or fish, and for aiding the propagation thereof, the commissioner may acquire in fee by purchase, gift or devise, or may lease, or, with the consent of the owners, may control, any land, water or shore or the right to use the same, including the right of the public on such land or on or in such water or shore, as a wild life sanctuary. The commissioner, with the approval of the governor and council, may receive in trust for the commonwealth any grant or devise of land or any gift or bequest of personal property for the purpose of aiding in the propagation and protection of any useful birds, mammals or fish; provided, that, unless approved by the general court, no obligation shall be imposed on the commonwealth to expend in the carrying out of any trust more than the income of the trust property, or more than the income and principal thereof if by the terms of the trust the principal may be expended. Any such gift or bequest of money or securities shall be transferred forthwith to the state treasurer, who shall administer it as provided in section sixteen of chapter ten."

This land was conveyed to the Commonwealth in accordance with the second sentence of Mass. G.L., c. 131, § 90 (cited above). A valid charitable trust was created.

From the facts which you have submitted to this office, it is clear that the purpose of the conveyer was that the land should be used only as a wild-life sanctuary. There is no evidence to indicate that it is now impossible to maintain this land in accordance with this purpose.

Massachusetts General Laws c. 131, § 90 provides only that the Governor and Council shall approve the acceptance of such a gift. No statutory provision has been made for altering or amending the trust agreement after it has been accepted. This is to be contrasted with Mass. G.L., c. 155, § 3.

Mass. Gen. Laws c. 155, § 3:

"Every act of incorporation passed since March eleventh, eighteen hundred and thirty-one, shall be subject to amendment, alteration or repeal

by the general court. All corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them. . . ."

An easement granted to a private group or corporation for use as a ski area is materially different from the land being used as a public wild-life sanctuary. No provision was included in the conveyance for alteration or amendment of the trust.

You have suggested that this trust be changed by a special statute. In the leading case of *Cary Library v. Bliss*, 151 Mass. 364, 378 (1890), the Court discussed the feasibility of such a course of action and found that it would impair the obligations of contract.

" . . . We are of the opinion that the statute which we are considering impairs the obligation of the contract under which this charity is administered. The principles which lie at the foundation of the *Dartmouth College case*, and of other similar decisions, are decisive of the questions before us. . . . The law laid down in these cases, that a charter establishing an eleemosynary corporation is a contract which cannot be changed by the Legislature without the consent of the partner to it, is a mere extension of the doctrine which gives a similar effect to the written statement of a scheme that is made the foundation of donations to unincorporated trustees of a public charity. [151 Mass. 364 at p. 378.]

In light of the precedent established by the Supreme Judicial Court and the action taken by the Legislature, it is my opinion, on the facts that you have presented, that this land must remain a public wild-life sanctuary, uninhibited by an easement granted to a private group or corporation.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The person appointed as the substitute for a State official suspended because of an indictment for misconduct in office succeeds to the ex officio appointments held by the latter.*

JULY 30, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works*.

DEAR SIR: — I have your request of July 23, 1963 relative to two questions concerning the suspension of Rodolphe G. Bessette, Director of the Division of Waterways, as it affects the Merrimack River Flood Control Commission, of which Commission Mr. Bessette was a member.

You ask (1) is the Acting Director, Mr. Anthony W. Spadafora, now a member of said Commission and (2) if Mr. Spadafora is a member, is he then Treasurer of the Commission?

The Merrimack River Valley Flood Control Commission was created by Article II of St. 1956, c. 608, which provides in part as follows:

"A member of the commission may be removed or suspended from office as provided by the law of the state from which he shall be appointed,

and any vacancy occurring in the commission shall be filled in accordance with the laws of the state wherein such vacancy exists."

Article II further provides:

"The commission shall elect from its members a chairman, vice-chairman, clerk and treasurer."

Section 3 of Article IX of the act provides in part:

". . . The director of the division of waterways in the department of public works, and the director of sanitary engineering and chief sanitary engineer in the department of public health, shall compose said commission."

Accordingly, in answer to your first question, it is my opinion that Mr. Bessette ceased to be a member of this Commission as of June 27, 1963, the effective date of his suspension, and that Mr. Spadafora, upon his qualification as Acting Director of the Division of Waterways, by virtue of the provisions of St. 1956, c. 608, became a member of the Merrimack River Valley Flood Control Commission.

In respect to your second question, it is my opinion that Mr. Spadafora does not become treasurer of the Commission, inasmuch as the Commission must elect a treasurer from its members.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Obscene Literature Control Commission may publicize its functions and collect information outside the Commonwealth but cannot hold official meetings under the sponsorship, and on the premises of, private organizations.*

JULY 31, 1963.

OBSCENE LITERATURE CONTROL COMMISSION.

GENTLEMEN: — I have your request for my opinion relative to the authority of the Obscene Literature Control Commission to accomplish the following matters:

1. To publish a pamphlet describing the powers, functions and activities of the Commission;
2. To answer questions relative to the powers, functions and activities of the Commission propounded by citizens either orally at open meetings of the Commission or in writing through the mail;
3. To visit the national capital or other places for the purpose of securing information which will be of assistance to the Commission in the performance of its duties; and
4. To hold official, public meetings of the Commission under the sponsorship and at the premises of private organizations.

The first two items can be dealt with together. The Commission is an organ of government. The populace is entitled to information concerning the powers, functions and activities of the Commission. Otherwise,

the public could not intelligently evaluate the performance of the Commission, or recommend any legislation which such information may indicate to be desirable. This is not to say, of course, that the Commission is obliged to answer each and every question propounded to it. A request that the minutes of a meeting of the Commission in executive session be made public is but one example of a request which might properly be denied. In general, however, the Commission may respond to questions concerning its powers, functions and activities and may on its own initiative publish a descriptive pamphlet setting forth such powers, functions and activities.

The third item of the request concerns the power of the Commission to gather information relevant to the performance of the Commission's duties. As you know, the Commission was established "in order to facilitate the enforcement of sections twenty-eight to thirty-two, inclusive, of chapter two hundred and seventy-two. . . ." G.L., c. 4, § 101. The Commission has the power to collect data or information in pursuance of this purpose. The fact that such data or information is located in Washington, D. C., or elsewhere, as opposed to within the Commonwealth, does not defeat such power.

I do not imply by the foregoing that the General Court is required to appropriate such funds as may be necessary or desirable for the exercise of any of the above powers, but only that any such appropriation would be for a lawful purpose. The size of the appropriation for the Commission, as you know, is not within the jurisdiction of this office.

Finally, it is my opinion that the Commission cannot properly hold its official meetings under the sponsorship and at the premises of private organizations. As any agency of government, the Commission can serve but one master — the Commonwealth. A sponsorship of the type you mention would create a reasonable basis for the impression that the sponsoring organization could improperly influence the Commission or its members or unduly enjoy its or their favor in the performance of its or their official duties, in violation of the principles of section 23 (e) of chapter 779 of the Acts of 1962.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Under the 1962 Amendments to the Sunday Laws only activities referred to for which admission fees are charged are required generally to be licensed, but the licensing of certain activities for which admission fees are charged is prohibited.*

AUG. 2, 1963.

HON. FRANK S. GILES, *Commissioner of Public Safety*.

DEAR SIR: — This is in reply to your letters of April 15, May 24 and June 3 requesting opinions relative to interpretation of G.L., c. 136, the so-called Sunday Law. Since the questions are related, I am taking the liberty of combining the answers in one opinion.

Your questions involve an interpretation of the new Chapter 136, added to the General Laws by Chapter 616 of the Acts of 1962. The controlling part of the statute is section 4, which is as follows:

“(1) The mayor of a city or the selectmen of a town, upon written application describing the proposed dancing or game, sport, fair, exposition, play, entertainment or public diversion, except as provided in section one hundred and five of chapter one hundred and forty-nine, may grant, upon such reasonable terms and conditions as they may prescribe, a license to hold on Sunday dancing or any game, sport, fair, exposition, play, entertainment or public diversion for which a charge in the form of payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein, except horse racing, dog racing, automobile racing, boxing, wrestling and hunting with firearms; provided, however, that no such license shall be issued for dancing for which a charge in the form of the payment of collection of money or other valuable consideration is made for the privilege of engaging therein; and provided further, however, that no license issued under this paragraph shall be granted to permit such activities before one o'clock in the afternoon; and provided, further, that such application, except an application to conduct an athletic game or sport, shall be approved by the commissioner of public safety and shall be accompanied by a fee of two dollars, or in the case of an application for the approval of an annual license by a fee of fifty dollars.

“(2) Licenses may be issued by the authorities designated in paragraph (1) to permit such activities before one o'clock in the afternoon, with the written approval of the commissioner of public safety and upon such reasonable terms and conditions as prescribed by him therein. The application for the approval of the proposed activity by the commissioner shall be in writing and shall be accompanied by a fee of five dollars or in the case of an application for the approval of an annual license by a fee of one hundred dollars.

“(3) The licensing authority, or the commissioner of public safety or his designee, may revoke, cancel or suspend any license issued under this section upon evidence that the terms or conditions of such license or provisions of law are being violated; provided, however, that said commissioner shall not revoke, cancel or suspend any license issued under paragraph (1) which he is not required by said paragraph to approve.

“(4) The city council of a city or board of selectmen of a town may determine fees for the issuance of licenses not to exceed ten dollars for a license for a single event, nor two hundred dollars for an annual license.

“(5) The city council of a city and board of selectmen of a town may make regulations relative to granting of licenses under this section and may revoke or amend them from time to time.

“(6) The provisions of this section, in so far as they require a license for the use of radio and television, shall not apply to premises licensed under the provisions of section twelve of chapter one hundred and thirty-eight.

“(7) Sections two and three and this section shall not apply to golf, tennis, bowling-on-the-green, skiing, or any activity in a gymnasium or on

any rink, court, or field, for which a charge is made only for the privilege of engaging therein and not for the privilege of being present thereat as a spectator."

### *I. Dancing, Entertainments and Other Public Diversions.*

The new Chapter 136 substituted in 1962 is somewhat more lenient than the old chapter. Section 4 now authorized the licensing of any Sunday dancing, game, entertainment, public diversion, etc., for which there is a charge either to participate or to be present as a spectator. In comparison, the former Chapter 136 required licenses for such Sunday activities whether or not there was an accompanying charge. Presumably, therefore, no more being said, the new legislation indicates that free entertainments, public diversions, etc., may be held without prior application for a license. Farther on in the statute it is provided that no license shall be issued for Sunday *dancing* for which a charge is made; clearly, therefore, dancing for which there is no charge (either to participate or to be present as a spectator) is contemplated as a permissible, unlicensed activity. Otherwise there would have been no point in including it at a prior point in the statute in the list of allowable Sunday recreations.

Where no license is required, then clearly there is no necessity of approval of the license application by the Commissioner of Public Safety. The paragraph denoting activities which must be licensed states:

"... such application, except an application to conduct an athletic game or sport, shall be approved by the commissioner of public safety. . . ." G.L. c. 136, section 4 (1)

Of course, where no license is required, there will be no application and nothing under the statute to be approved by the Commissioner.

### *II. Golf Driving Ranges.*

Such a Sunday activity would ordinarily fall within the licensing provisions of section 4 (1) as a game, sport or public diversion. However, paragraph (7) of said section 4 operates to remove the activity from the effect of the section. Paragraph (7) provides:

"(7) Sections two and three and this section shall not apply to golf, tennis, bowling-on-the-green, skiing, or any activity in a gymnasium or on any rink, court, or field, for which a charge is made only for the privilege of engaging therein and not for the privilege of being present thereat as a spectator.

Whether or not what is done at a driving range should be classified as "golf" need not be decided. In any event the activity clearly falls within the category of "any activity . . . on any . . . field, for which a charge is made only for the privilege of engaging therein", and thus is exempted by the paragraph from the licensing requirements of the section in any case where there is no charge for the privilege of being present as a spectator.

### *III. Motorcycle Racing.*

Motorcycle racing appears to fall within the category of "entertainment" or "public diversion" specified in section 4 (1); therefore, if a charge is made for the privilege of being present thereat or engaging therein the activity is required to be licensed, and the application for a license must be approved by the Commissioner of Public Safety.

In so far as section 4 (1) prohibits entirely any Sunday "horse racing, dog racing, automobile racing, boxing, wrestling and hunting with firearms" for which any charge is made, the question has been raised whether or not the term "automobile" should be construed so as to include motorcycles. Chapter 136 contains no definitions section; the only applicable definition is that appearing in Chapter 90, the statutes generally regulating motor vehicles. There "automobile" is defined as "any motor vehicle except a motor cycle". G.L. c. 90, section 1. Whether or not the legislature actually intended motorcycle racing to be prohibited on Sunday is a matter of conjecture; whatever the answer, the Sunday laws are criminal statutes and must be construed strictly. Motorcycles are not in the common sense considered to be automobiles, and it must be assumed that had the legislature intended to include them within the prohibition that these vehicles would have been specifically mentioned.

It is my opinion that motorcycle racing cannot be considered an ordinary athletic game or sport so as to exempt it from the requirement of section 4 (1) that the license application be approved by the Commissioner of Public Safety. Likewise, the exemption granted by paragraph (7) of section 4 is inapplicable, since a charge is made for the privilege of being a spectator at such a race. Therefore, motorcycle racing must be treated as any other Sunday "entertainment" or "public diversion" for which a charge is made either to participate or to be present as a spectator; i.e., it must be licensed, and the application for a license must be approved by the Commissioner of Public Safety.

In regard to Sunday activities conducted without a license in cases where section 4 (1) requires that such a license be issued, sections 2 and 3 of new Chapter 136 come into effect. Section 2 imposes a fine upon any person who is present at or engages in any such unauthorized game, entertainment, public diversion, etc. Section 3 is a broad section which fines any person who attempts, offers to or actually promotes, maintains or conducts such unauthorized entertainment.

"Whoever on Sunday is present at or engaged in dancing or any game, sport, fair, exposition, play, entertainment or public diversion for which a charge in the form of the payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein, and for which a license has not been granted as provided in section four, shall be punished by a fine of not more than fifty dollars."

"Whoever on Sunday offers to view, sets up, establishes or maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining, or acts as proprietor, manager or person in charge of, dancing or any game, sport, fair, exposition, play, entertainment or public diversion for which a charge in the form of the

payment of money or other valuable consideration is made for the privilege of being present thereat or engaging therein, and for which a license has not been granted as provided in section four, shall be punished by a fine or not more than two thousand dollars."

Where Sunday activities are being held in conformance with law other clauses of the statute become applicable. Section 5 of Chapter 136 generally penalizes the keeping open of shops and the doing of any manner of labor, business or work, except works of necessity and charity, on Sunday. Section 6 then lists activities which shall not be prohibited under section 5. In connection with the problem at issue, the following should be noted:

"Section 6. *Limitation of operation of section 5.*

"Section five shall not prohibit the following:

. . .

"(39) The necessary preparation for, and the conduct of, events licensed under section four, or activities as to which, under the provisions of paragraph (7) of section four, sections two, three and four do not apply.

"(40) Any labor, business or work necessary to the performance of or incidental to any religious exercises, including funerals and burials, the execution of wills or codicils, *or any other activity not prohibited nor required to be licensed on Sunday.*" (Emphasis supplied.)

Therefore, in accordance with the above analysis, I advise you that under the new provisions of G.L., c. 136, as now in effect, no license is required for holding on Sunday dancing, or any game, sport, fair, exposition, play, entertainment or public diversion for which no charge in the form of payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein. Likewise, no license is required for "golf, tennis, bowling-on-the-green, skiing, or any activity in a gymnasium or on any rink, court, or field, for which a charge is made only for the privilege of engaging therein and not for the privilege of being present thereat as a spectator".

However, no license may be issued to permit the holding on Sunday of horse racing, dog racing, automobile racing, boxing, wrestling or hunting with firearms, for which a charge in the form of payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein; and no license may be issued for dancing for which such a charge is made for the privilege of engaging therein.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*



*State Secretary may accept Referendum petition asking for suspension of emergency law increasing salaries of legislators and issue forms for subsequent signers where Attorney General has stipulated in pending court proceedings that such would be done.*

AUG. 5, 1963.

HON. JOHN T. DRISCOLL, *Treasurer and Receiver General.*

DEAR SIR: — I have your request of July 30, 1963 for my opinion relative to whether or not there are any impediments to your department in paying the members of the General Court their increased allowances and salary as provided by c. 506 of the Acts of 1963.

In the present litigation (*Jack E. Molesworth, et al. v. Secretary and Treasurer of the Commonwealth*), a prayer for a restraining order to enjoin you from paying the members of the General Court their increased allowances and salary was denied.

I have previously advised the Secretary of the Commonwealth in my opinion dated July 11, 1963, that it is my considered opinion that a petition by referendum to suspend the legislation involved may not properly relate to such act provided an emergency preamble is affixed thereto. Accordingly, it is my opinion that there are no impediments to your department relative to paying the members of the General Court the increased allowances and salary as provided in c. 506 of the Acts of 1963.

However, I deem it appropriate to comment that, inasmuch as the matter is presently the subject of litigation, and should the petitioners prevail, and duly perfect the referendum petition by filing in accord with our Constitution, c. 506 of the Acts of 1963 would thereupon be suspended and the sums appropriated under the legislation would have to be returned to you as Treasurer of the Commonwealth. I suggest to you that from a practical viewpoint it would be well for you to advise and inform the members of the General Court of this possibility as the individual members apply to your department for the increased allowances and salary.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

AUG. 5, 1963.

HON. FRANK S. GILES, *Department of Public Safety.*

DEAR SIR: — In your letter of June 20, 1963, you have asked the opinion of this office whether St. 1963, c. 386 applies to the Logal International Airport which is administered by the Massachusetts Port Authority.

The Massachusetts Port Authority was created by the Legislature as a corporation under the authority of Chapter 465 of the Acts of 1956 as amended by Chapter 599 of the Acts of 1953.

St. 1956, c. 465, section 2.

“There is hereby created and placed in the department of public works a body politic and corporate to be known as the Massachusetts Port Au-

thority, which shall not be subject to the supervision or regulation of the department of public works or of any department, commission, board, bureau or agency of the Commonwealth except to the extent and in the manner provided in this act. . . .”

By the authority of this statute, the Massachusetts Port Authority undertook the administration of the properties located in the city of Boston and known as the “Logan International Airport.”

St. 1956, c. 465 as amended by St. 1958, c. 599, Section 1.

(a) the term “airport properties” shall include the General Edward Lawrence Logan International Airport, hereafter called the Logan Airport, and Lawrence G. Hanscom Field, together with all buildings and other facilities and all equipment, appurtenances, property, rights, easements and interests acquired or leased by the Commonwealth in connection with the construction or the operation thereof and in charge of the state airport management board.

The duties and powers of the Authority are outlined by statute. The Authority may pass rules and regulations incident to the operation of the Logan International Airport.

St. 1956, c. 465, section 3.

(g) To extend, enlarge, improve, rehabilitate, lease as lessor or as lessee, maintain, repair and operate the projects under its control, and to establish rules and regulations for the use of any such project; provided, however, that no such rules and regulations shall conflict with the rules and regulations of any state or federal regulatory body having jurisdiction over the operation of aircraft. . . .

No vested property right is inherent in this grant of power. *Tapper v. Boston Chamber of Commerce*, 249 Mass. 229, 240 (1924). Such a right is limited by statute to rules and regulations tailored to meet situations peculiar to the operation of a large metropolitan airport. This power could be used only for this designated purpose.

By statute the legislature gave to the towns and municipalities the power to license taxicabs.

Mass. General Laws c. 40, section 22.

Except as otherwise provided in section eighteen of chapter ninety and subject, so far as applicable, to section two of chapter eighty-five and sections eight and nine of chapter eighty-nine, a city or town may make ordinances or by-laws, or the board of aldermen or the selectmen may make rules and orders, for the regulation of carriages and vehicles used therein, with penalties for the violation thereof not exceeding twenty dollars for each offense; and may annually receive one dollar for each license granted to a person to use any such carriage or vehicle therein.

The right of the city of Boston to issue such licenses has been specifically outlined by statute.

St. 1930, c. 392, section 3.

In said city, no person shall drive or have charge of a hackney carriage, nor shall any person, firm or corporation set up and use a hackney car-

riage, unless licensed thereto by the police commissioner of the city of Boston; nor shall any person having the care or ordering of such a vehicle in said city suffer or allow any person other than a driver so licensed to drive such a vehicle.

The Massachusetts Port Authority has not been granted such a licensing power by the Legislature. In the absence of a grant of this power by statute it could not exercise such a power.

A corporation cannot usurp functions not granted to it, nor stretch its lawful franchise beyond the limits of their reasonable intendment. It cannot engage in matters foreign to the objects for which it was incorporated. Its main business must be confined to those operations which appertain to the general purposes for which it was organized and which are defined in its charter. . . . [*Teale v. Rockport Granite Co.*, 224 Mass. 20, 24, 25 (1915)]

The Legislature in 1963 passed a new statute entitled, "An Act relative to the regulation of taxicabs within the city of Boston". This statute reads as follows:

St. 1963, c. 306.

In the city of Boston, no person driving or having charge of a taxicab shall solicit the carriage of a passenger or passengers for hire unless said person is licensed as a hackney carriage driver, and said taxicab is licensed as a hackney carriage, by the police commissioner of said city. This act shall not be construed as prohibiting the driver of a taxicab licensed as such outside of said city from accepting a passenger or passengers for hire within said city if summoned by telephone or radio for the purpose. Whoever violates the provisions of this act shall be punished by a fine of not more than fifty dollars.

It is without dispute that Logan International Airport is located within the city of Boston. The statute is clear as to the area to which it is to apply. The Legislature has made no exceptions. This statute must be read as drafted and enacted by the Legislature.

But it is also settled that, in construing a statute, its words must be given their plain and ordinary meaning according to the approved usage of language . . . and that the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it. . . . [*Johnson's Case*, 318 Mass. 741, 747 (1945)]

In light of the action taken by the Legislature, it is my opinion that St. 1963, c. 386 applies to the Logan International Airport.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

AUG. 5, 1963.

HOWARD S. WILLARD, *Director, Department of Natural Resources, Division of Law Enforcement*.

DEAR SIR: — In your letter of June 12, 1963, you ask two questions, the first of which is as follows:

"Your opinion is respectfully requested to the question whether the police powers granted to the officers of this division (i.e., the division of enforcement of the Department of Natural Resources) by the said section 6B (of G.L., c. 21) are general police powers enabling them to act in the enforcement of all criminal laws of the Commonwealth, or are the police powers limited to only those duties referred in the said section 6A (of G.L., c. 21)."

Section 6B of G.L., c. 21 is as follows:

"The commissioner, director and all enforcement officers appointed by the director shall have and exercise throughout the commonwealth, subject to such rules and regulations as the director may from time to time promulgate, all the authority of police officers and constables, except the service of civil process. Such rules and regulations shall be subject to the approval of the board of natural resources and shall be filed with the state secretary in accordance with section thirty-seven of chapter thirty. The director may in writing authorize any enforcement officer to have in his possession and carry a revolver, club, billy, handcuffs, twisters, or any other weapon or article required in the performance of his official duty."

It is my opinion that this section authorizes and directs the Commissioner of Natural Resources, the Director of the Division of Enforcement and all enforcement officers in the Division to exercise general police powers with respect to all criminal violations of the laws of the Commonwealth. The language of the statute is unambiguous, and in clear contrast to the limiting language previously used by the Legislature in G.L., c. 130, § 8 and c. 131, § 20. This conclusion is further supported by the necessity of members of the division of enforcement to police large areas of land within the control of the Department of Natural Resources to which the public has access and where large numbers of people are concentrated from time to time.

It is equally clear from the general statutory scheme that the Legislature did not intend to create a second state police force, but intended to authorize the exercise of general police power only as an incident to the general responsibilities or functions of the Department of Natural Resources. The statutory scheme contemplates practical limitations of these powers through administrative action, i.e., the rules and regulations established by the Director. It is the responsibility of the Director, therefore, to delineate the scope of the exercise of general police powers by officers of the division in accordance with the statutory plan.

Your letter continues as follows:

"The second question for which an opinion is respectfully requested is whether or not the officers of this division are police officers within the meaning of General Laws Chapter 149, paragraph 178D."

The section referred to permits employees of the Commonwealth and political subdivisions thereof to join labor unions for the purpose of collective bargaining, but excepts "police officers" from the operation of this action. The purpose of this exception is clearly to restate the principle that the sovereign will not permit those chosen to protect the public safety to exert economic pressure through collective action.

Authorities are divided on the issue as to whether conservation officers with general police powers are "police officers," and the result in such case appears to depend upon the apparent policy of the relevant statute. See, for example, *Wyndham v. United States*, 197 F. Supp. 856 (D.C.S.C.); *City of Rochester v. Lindner*, 4 N.Y.S.2d 4, 7, 167 Misc. 790; and *Commonwealth v. Smith*, 111 Mass. 407.

In my opinion, the exception contained in G.L., c. 149, § 178D is directed to those persons primarily charged with protection of the public safety, i.e., members of police departments and police forces. Enforcement officers of the Department of Natural Resources are therefore not "police officers" within the meaning of said section.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Referendum petition asking for the suspension of St. 1963, c. 606, an emergency law, does not impede the payment by the State Treasurer to a legislator of the increased allowances and salaries thereunder.*

AUG. 5, 1963.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR SECRETARY WHITE: — I have your request dated July 31, 1963 relative to my opinion as to whether or not the petitions for suspension by referendum of c. 506 of the Acts of 1963 may be filed with your office should the required signatures be obtained and the petitioners present them to you.

As you are aware, the subject matter of the suspension of this act and the emergency preamble affixed thereto is at present being litigated before the Supreme Judicial Court (*Jack E. Molesworth, et als. v. Secretary and Treasurer of the Commonwealth*). I have previously forwarded to you my opinion dated July 11, 1963 wherein I have stated that it is my opinion that the referendum petition to suspend may not attach to an act of the Legislature to which is affixed an emergency preamble.

As counsel for you in the above noted litigation, this department has, with your consent, and by agreement in open court with counsel for petitioners, stipulated that inasmuch as the litigation could extend beyond the ninety-day period suspended by the emergency preamble, in all fairness to the petitioners your office may prepare the petitions so that in the interim the petitioners may circulate same in order to obtain the required signatures.

The issue of whether or not these petitions may operate to suspend c. 506 of the Acts of 1963 pursuant to our Constitution is a matter which will be determined by the Court.

Accordingly, should the petitioners present petitions to suspend c. 506 of the Acts of 1963, your office may properly receive same for filing. However, any official processing of said petitions by your office must await the outcome of the pending litigation.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The officers of the Division of Law Enforcement in the Department of Natural Resources have general police powers as to all violations of State criminal law, subject to limitations of the rules and regulations of the Director. Such officers are not, however, within the exception of "police officers" in the statute permitting State employees to join labor unions.*

AUG. 5, 1963.

HOWARD S. WILLARD, *Director, Department of Natural Resources, Division of Law Enforcement.*

DEAR SIR: — In your letter of June 12, 1963, you ask two questions, the first of which is as follows:

"Your opinion is respectfully requested to the question whether the police powers granted to the officers of this division (i.e., the division of enforcement of the Department of Natural Resources) by the said section 6B (of G.L., c. 21) are general police powers enabling them to act in the enforcement of all criminal laws of the Commonwealth, or are the police powers limited to only those duties referred in the said section 6A (of G.L., c. 21)."

Section 6B of G.L., c. 21 is as follows:

"The commissioner, director and all enforcement officers appointed by the director shall have and exercise throughout the commonwealth, subject to such rules and regulations as the director may from time to time promulgate, all the authority of police officers and constables, except the service of civil process. Such rules and regulations shall be subject to the approval of the board of natural resources and shall be filed with the state secretary in accordance with section thirty-seven of chapter thirty. The director may in writing authorize any enforcement officer to have in his possession and carry a revolver, club, billy, handcuffs, twisters, or any other weapon or article required in the performance of his official duty."

It is my opinion that this section authorizes and directs the Commissioner of Natural Resources, the Director of the Division of Enforcement and all enforcement officers in the Division to exercise general police powers with respect to all criminal violations of the laws of the Commonwealth. The language of the statute is unambiguous, and in clear contrast to the limiting language previously used by the Legislature in G.L., c. 130, § 8 and c. 131, § 20. This conclusion is further supported by the necessity of members of the division of enforcement to police large areas of land within the control of the Department of Natural Resources to which the public has access and where large numbers of people are concentrated from time to time.

It is equally clear from the general statutory scheme that the Legislature did not intend to create a second state police force, but intended to authorize the exercise of general police power only as an incident to the general responsibilities or functions of the Department of Natural Resources. The statutory scheme contemplates practical limitations of these powers through administrative action, i.e., the rules and regulations established by the Director. It is the responsibility of the Director,

therefore, to delineate the scope of the exercise of general police powers by officers of the division in accordance with the statutory plan.

Your letter continues as follows:

"The second question for which an opinion is respectfully requested is whether or not the officers of this division are police officers within the meaning of General Laws Chapter 149, paragraph 178D."

The section referred to permits employees of the Commonwealth and political subdivisions thereof to join labor unions for the purpose of collective bargaining, but excepts "police officers" from the operation of this action. The purpose of this exception is clearly to restate the principle that the sovereign will not permit those chosen to protect the public safety to exert economic pressure through collective action.

Authorities are divided on the issue as to whether conservation officers with general police powers are "police officers," and the result in such case appears to depend upon the apparent policy of the relevant statute. See, for example, *Wyndham v. United States*, 197 F. Supp. 856 (D.C.S.C.); *City of Rochester v. Lindner*, 4 N.Y.S.2d 4, 7, 167 Misc. 790; and *Commonwealth v. Smith*, 111 Mass. 407.

In my opinion, the exception contained in G.L., c. 149, § 178D, is directed to those persons primarily charged with protection of the public safety, i.e., members of police departments and police forces. Enforcement officers of the Department of Natural Resources are therefore not "police officers" within the meaning of said section.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*St. 1963, c. 306, regulating the operation of taxicabs in Boston applies to the Logan International Airport.*

AUG. 5, 1963.

COMMISSIONER FRANK S. GILES, *Department of Public Safety*.

DEAR COMMISSIONER GILES: — In your letter of June 20, 1963, you have asked the opinion of this office whether St. 1963, c. 386 applies to the Logan International Airport which is administered by the Massachusetts Port Authority.

The Massachusetts Port Authority was created by the Legislature as a corporation under the authority of Chapter 465 of the Acts of 1956 as amended by Chapter 599 of the Acts of 1958.

St. 1956, c. 465, section 2.

"There is hereby created and placed in the department of public works a body politic and corporate to be known as the Massachusetts Port Authority, which shall not be subject to the supervision or regulation of the department of public works or of any department, commission, board, bureau or agency of the Commonwealth except to the extent and in the manner provided in this act. . . ."

By the authority of this statute, the Massachusetts Port Authority undertook the administration of the properties located in the city of Boston and known as the "Logan International Airport".

St. 1956, c. 465 as amended by St. 1958, c. 599, Section 1.

(a) the term "airport properties" shall include the General Edward Lawrence Logan International Airport, hereafter called the Logan Airport, and Lawrence G. Hanscom Field, together with all buildings and other facilities and all equipment, appurtenances, property, rights, easements and interests acquired or leased by the Commonwealth in connection with the construction or the operation thereof and in charge of the state airport management board.

The duties and powers of the Authority are outlined by statute. The Authority may pass rules and regulations incident to the operation of the Logan International Airport.

St. 1956, c. 465, section 3.

(g) To extend, enlarge, improve, rehabilitate, lease as lessor or as lessee, maintain, repair and operate the projects under its control, and to establish rules and regulations for the use of any such project; provided, however, that no such rules and regulations shall conflict with the rules and regulations of any state or federal regulatory body having jurisdiction over the operation of aircraft. . . .

No vested property rights is inherent in this grant of power. *Tapper v. Boston Chamber of Commerce*, 249 Mass. 229, 240 (1924). Such a right is limited by statute to rules and regulations tailored to meet situations peculiar to the operation of a large metropolitan airport. This power could be used only for this designated purpose.

By statute the legislature gave to the towns and municipalities the power to license taxicabs.

Mass. General Laws c. 40, section 22.

Except as otherwise provided in section eighteen of chapter ninety and subject, so far as applicable, to section two of chapter eighty-five and sections eight and nine of chapter eighty-nine, a city or town may make ordinances or by-laws, or the board of aldermen or the selectmen may make rules and orders, for the regulation of carriages and vehicles used therein, with penalties for the violation thereof not exceeding twenty dollars for each offense; and may annually receive one dollar for each license granted to a person to use any such carriage or vehicle therein. The right of the city of Boston to issue such licenses has been specifically outlined by statute.

St. 1930, c. 392, section 3.

In said city, no person shall drive or have charge of a hackney carriage, nor shall any person, firm or corporation set up and use a hackney carriage, unless licensed thereto by the police commissioner of the city of Boston; nor shall any person having the care or ordering of such a vehicle in said city suffer or allow any person other than a driver so licensed to drive such a vehicle.



The Massachusetts Port Authority has not been granted such a licensing power by the Legislature. In the absence of a grant of this power by statute it could not exercise such a power.

A corporation cannot usurp functions not granted to it, nor stretch its lawful franchise beyond the limits of their reasonable intendment. It cannot engage in matters foreign to the objects for which it was incorporated. Its main business must be confined to those operations which appertain to the general purposes for which it was organized and which are defined in its charter. . . . [*Teele v. Rockport Granite Co.*, 224 Mass. 20, 24, 25 (1916)]

The Legislature in 1963 passed a new statute entitled, "An Act relative to the regulation of taxicabs within the city of Boston". This statute reads as follows:

St. 1963, c. 386

In the city of Boston, no person driving or having charge of a taxicab shall solicit the carriage of a passenger or passengers for hire unless said person is licensed as a hackney carriage driver, and said taxicab is licensed as a hackney carriage, by the police commissioner of said city. This act shall not be construed as prohibiting the driver of a taxicab licensed as such outside of said city from accepting a passenger or passengers for hire within said city if summoned by telephone or radio for the purpose. Whoever violates the provisions of this act shall be punished by a fine of not more than fifty dollars.

It is without dispute that Logan International Airport is located within the city of Boston. The statute is clear as to the area to which it is to apply. The Legislature has made no exceptions. This statute must be read as drafted and enacted by the Legislature.

But it is also settled that, in construing a statute, its words must be given their plain and ordinary meaning according to the approved usage of language . . . and that the language of the statute is not to be enlarged or limited by construction unless its object and plain meaning require it. . . . [*Johnson's Case*, 318 Mass. 741, 747 (1915)]

In light of the action taken by the Legislature, it is my opinion that St. 1963, c. 386 applies to the Logan International Airport.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The State Department of Public Works may not charge fees for permits issued under statutes which do not provide for fees. Such fees may be authorized in the exercise of the police power or of the power to tax, if there is no double taxation.*

AUG. 6, 1963.

COMMISSIONER JACK P. RICCIARDI, *Department of Public Works*.

Re: Charging of Fees by the *Department of Public Works*.

DEAR COMMISSIONER RICCIARDI: — You have requested my opinion as to whether or not the Department of Public Works may charge a fee when a permit is issued under the following provisions of the General Laws:

Chapter 81, Section 21; Chapter 85, section 30; Chapter 90, Sections 19 and 19A; or any other statutory provision governing permits.

You have also requested my opinion, if the answer to the preceding is in the negative, as to whether or not enactment of appropriate legislation would enable the Department to charge fees for such permits. You state that it is your intention to pay all fees collected to the Treasury of the Commonwealth to be credited to the Highway Fund.

It is my opinion that the Department of Public Works may not charge a fee for the issuance of permits under the provisions of the General Laws cited in the first paragraph hereof, nor under any other provision of the General Laws which does not expressly provide for such fees.

It is further my opinion that appropriate legislation would enable the Department of Public Works to charge fees for such permits, provided said legislation does not create double taxation.

The power to determine fees payable for the issuance of such permits is vested solely in the General Court by the Constitution of the Commonwealth. If the fee is commensurate with the reasonable expense incidental to issuing permits, it is an exercise of the police power vested solely in the General Court, under Constitution of Massachusetts, Chapter 1, Section 1, Article 4. If the fee is productive of revenue greatly in excess of the cost of administering the law, it is an exercise of the power to tax which also belongs exclusively to the General Court. Constitution of Massachusetts, Chapter 1, Section 1, Article 4.

Therefore the Department of Public Works may not charge fees unless authorized to do so by the General Court.

When the General Court intends that fees be collected for the issuance of permits and licenses, it expresses its intent in clear and unmistakable language. For example, Chapter 262, Section 34 (15) sets forth a fee of one dollar for the permit to conduct blasting operations required under Chapter 148, Section 19. Your attention is also invited to Chapter 175, Section 15, setting forth various fees required for licenses relative to the business of insurance, and Chapter 140, Section 77, making the license fee for pawn brokers fifty dollars; and Chapter 91, Section 50, allowing the Department of Public Works to charge foreign corporations engaged in wrecking and salvaging in navigable waters a license fee not exceeding twenty-five dollars.

However, the statutes about which you have inquired do not expressly allow fees. Moreover, Section 33 of Chapter 90 setting forth fees payable under Chapter 90 contains no provision for fees under Sections 19 or 19A. Chapter 81, Section 21 and Chapter 85, Section 30 are both silent on the matter of fees.

Therefore, without specific authorization in the provisions of the General Laws to which you referred it is clear that the General Court did not intend that fees be charged.

In answer to your question as to whether or not fees may be collected under any other provisions of the General Law reference is made to Chapter 91, Section 50, which expressly provides for those license fees collectible by your Department. Chapter 253, Section 39 does not in my opinion permit the collection of fees because the General Court has not included the requisite specific authority.

It is my opinion that amendments to the provisions of the General Laws referred to herein expressly authorizing fees and setting forth the amount thereof would enable your Department to charge such fees for permits. However, because such fees would be intended to produce revenue for the Highway Fund they would be deemed a form of taxation. At the present time there are other excises relating to motor vehicles. Therefore, if amendments are drafted to the provisions of the General Laws to motor vehicles violation of the principle against double taxation must be avoided. See *Opinion of the Justices*, 250 Mass. 591, 148 NE889, 1925.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Where husband and wife reside in Massachusetts, but the husband votes by absentee ballot in another state, the wife may not be registered to vote here.*

AUG. 6, 1963.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR SECRETARY WHITE: — In your letter of July 23, 1963, you have requested my opinion as to whether a wife can register to vote in Massachusetts although her husband who resides with his wife in this state, votes by absentee ballot in another state.

Mass. General Laws c. 51, section 1 sets forth the qualifications of voters. One of the qualifications set forth in this section is that the individual must have *resided* in the Commonwealth one year and in the city or town where he claims a right to vote six months last preceding a state, city or town election.

It is well settled that when used in reference to voting qualifications "resided" means "domiciled". *Williams v. Whiting et. al.*, 11 Mass. 424; *People ex rel. Driscoll v. Bender*, 144 N.Y.S. 145; *In re Caliguri*, 100 N.Y.S. 2d 7, *Application of Wooley*, 108 N.Y.S. 2d 165.

While there is a trend in the direction of permitting a married woman to choose her domicile, *Taylor v. Milam*, 894, Supp. 880, Massachusetts courts have consistently adhered to the view that the domicile of a married woman who resides with her husband is by operation of law that of her husband, *Greene v. Greene*, 28 Mass. 410; *Mason v. Hamer*, 105 Mass. 116; *Rolfe v. Walsh*, 318 Mass. 733. An exception to this general proposition has been made where the husband and wife have become separated due to the husband's marital wrong. *Rolfe v. Walsh*, 318 Mass. 733, or where the husband has unlawfully deserted his wife, *Town of Watertown v. Graves*, 112 F. 183.

While the question of a married woman's domicile in regard to election qualifications has not previously been presented to the Massachusetts courts, it would appear that case law would require the conclusion that a married woman living in Massachusetts cannot vote in this state when her husband with whom she resides votes by absentee ballot in another state.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Alcoholic Beverages Control Commission may stay the execution of any order suspending a license pending the outcome of judicial proceedings to review the validity of the order.*

AUG. 7, 1963.

HON. LAWRENCE W. LLOYD, *Chairman, Alcoholic Beverage Control Commission.*

DEAR SIR: — This is in reply to your request for an opinion dated August 7, relative to the procedure governing the Alcoholic Beverage Control Commission. You have asked whether the Commission, having determined to suspend licensees for violation of the Minimum Consumer Resale Price Law, may properly stay the execution of such suspension pending determination of the validity of the said Resale Price Law.

It is my considered opinion that such a stay of execution of the contemplated suspensions would be entirely proper. The licensees have filed pursuant to the State Administrative Procedure Act (Chapter 30A of the General Laws), a petition to review the determination of the Commission. Paragraph (3) of section 14 of said Chapter 30A of the General Laws provides:

(3) The filing of the petition shall not operate a stay of enforcement of the agency decision, *but the agency may stay enforcement*, and the reviewing court may order a stay upon such terms as it considers proper. (Emphasis supplied.)

The above provisions of the General Laws, Chapter 30A authorizes your Board, as an exercise of its judgment, to grant or deny a stay of enforcement. Clearly, this prerogative rests with the Commissioners, and it is therefore my considered opinion that the Alcoholic Beverages Control Commission may lawfully grant or deny stays of execution of proposed suspensions pending the outcome of a petition to review the agency decision brought pursuant to the State Administrative Procedure Act.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The discretionary authority to reimburse public utility companies for the cost of relocating utility facilities under the Federal Highway Program, referred to in the Attorney General's opinion of May 3, 1963, applies to situations where such facilities are located on private property by "permit" or "license," at sufferance. Such payments would be for a "public purpose" under Amendments, Article 62, of the State Constitution, and would be an expenditure for "cost of construction . . . of public highways," under Article 98.*

Re: Reimbursement of Utility Relocation Costs under 718 of the Acts of 1956.

DEAR COMMISSIONER: — You have asked if my Opinion of May 3, 1963 on this same subject applies to reimbursement of public utility companies for the cost of relocation of utility facilities installed on private property, such as railroad rights of way, pursuant to a permit or license.

The opinion contained herein is based on the assumption that the words "permit" and "license" as used in your letter of July 11, 1963 are intended to describe legal relationships between the utility and the owner of the private property involved which do not bestow on the utility which is using it any title or proprietary interest in the private property.

For those situations in which "permit" or "license" may have been used loosely by the utility and owner of private property, resulting in the creation of some property rights in the utility, your attention is respectfully invited to the Opinion of the Attorney General dated July 15, 1954 and reaffirmation thereof by the opinion of this Department dated February 15, 1963.

If the Commonwealth takes by eminent domain private property on which a utility is located by "permit" or "license" granted by the owner of that private property and if the utility has no interest in said property other than a revocable right to use it at the sufferance of the owner thereof, the Commonwealth is not *required* to pay the cost of relocating that utility. However, it is my opinion that under the provisions of Chapter 718 of the Acts of 1956 the Commonwealth *may* in its discretion pay the costs of relocating a utility under such circumstances.

The only factual differences between the circumstances considered in my opinion on this subject of May 3, 1963 and that being presently considered is that the utility in the earlier opinion was located in a public way at public sufferance, while here the utility is located on private property, and at the sufferance of the owner of that property. In either situation the utility has no property right as a part of the damage to which it can claim recovery of relocation costs at common law under the provisions of Chapter 79 of the General Laws.

Section 1 of Chapter 718 of the Acts of 1956 in paragraph 3 makes no distinction on the basis of whether utility facilities are located on public or private property. For the reasons set forth in my opinion of May 3, 1963 it is apparent that the General Court intended the Department of Public Works to take full advantage of Federal aid to the highway program whenever it was considered to be in the public interest. The problems which paragraph 3 of Section 1 of Chapter 718 of the Acts of 1956 was intended to resolve exist to the same extent whether the utility is located at sufferance on private or public property.

Title 23, U.S.C.A. in Section 123 makes it clear that the controlling Federal law permitting reimbursement in circumstances such as these makes no distinction based on the character of the ownership of the property on which the utility is located by "permit" or "license" prior to the relocation.

It is also my opinion that the interpretation of Chapter 718 of the Acts of 1956 contained herein which permits reimbursement of relocation of utilities originally located on private property at sufferance by "permit" or "license", does not conflict with any applicable provisions of the Constitution of the Commonwealth. A payment to a utility for such costs which are incidental to and necessitated by the construction of an interstate highway would not be any less a payment for a public purpose within the meaning of Article 62, Section 1 of that Constitution merely because the utility is originally located on private rather than public

property. Either situation involves a valid appropriation of funds to a private corporation to be spent for a public purpose.

It is also my opinion that the payment for relocation of utility facilities originally located on private property under the circumstances set forth herein is included within the meaning of expenditure for “. . . cost of construction . . . of public highways . . .”, as used in Article 78 of the Constitution of the Commonwealth when such relocation is incidental to and necessitated by the taking of said private property for the construction of a highway. The cost of relocation of utility facilities under such circumstances is not an expenditure of revenue for a non-highway purpose, but is an expense reasonably incident to the installation of a highway.

In conclusion, my opinion on this subject dated May 3, 1963 does apply to those situations in which utility facilities are originally located on private property by “permit” or “license” at the sufferance of and subject to unconditional revocation by the owner of that private property. In connection with the administration of the discretionary authority conferred on the Commissioners of the Department of Public Works by Section 1 of Chapter 718 of the Acts of 1956, your attention is respectfully invited to all of the conditions outlined in my opinion of May 3, 1963.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The conduct under the auspices of public school authorities, and as part of the school curriculum, of religious observances such as prayers, is prohibited under recent decisions of the Supreme Court of the United States. A pause for silent meditation, or gatherings of students before classes on their own initiative for devotional exercises, is not prohibited. Vocal prayer is not prohibited at functions such as graduation or baccalaureate exercises, which is not a part of the regular curricular activities. The teaching and study of the Bible, or religion, or the use in the public schools in connection with the observance of holidays having religious orations such as Christmas and Easter of exercises and songs involving religious beliefs, to illustrate its religious history significance of the holidays, is permissible.*

*No public school official can in good conscience disobey the mandate of the Supreme Court in the conduct of his official function, and other public officials should take appropriate action if violations persist.*

AUG. 20, 1963.

COMMISSIONER OWEN B. KIERNAN, *Department of Education*.

DEAR COMMISSIONER KIERNAN: — You have requested my opinion of the constitutionality of certain practices, real and hypothetical, of the public schools, as affected by the recent decisions of the Supreme Court in *Murray v. Curlett* and *School District of Abington Township v. Schempp*, 10 L. Ed. 2d 844. Prior to directing my attention to the specific questions asked, I think it appropriate to set forth some basic considerations.

In both the *Schempp* and *Murray* cases, the Court considered the validity of reading from the Bible and reciting the Lord's Prayer as part of the opening exercises in the public schools. In both cases, students could be relieved of the obligation to participate upon request of the parents. In *Murray*, the practice was required by a rule of the Board of School Commissioners of the City of Baltimore, which provided that the opening exercises consist of "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's prayer." In *Schempp*, the recitation of the Bible was required by the following Pennsylvania statute:

"At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

In a single opinion the Court held the statute, rule and practices unconstitutional under the First Amendment as it applies to the states under the Fourteenth Amendment.

The Court made clear that in its view the First Amendment, devotional readings and recitations of the type under consideration exceeded the powers of the state. Accordingly, it was immaterial that the exercises were brief, enjoyed widespread support, and were not mandatory. It was equally immaterial, in the Court's opinion, that the practices may have had beneficial effects on the students. A devotional reading as part of the public school curriculum is simply not within the power of civil government, in much the same fashion that the passage of a general law, however minor in nature and however beneficial it may be, is not within the power of any church. As a constitutional ruling under the Fourteenth Amendment, these decisions set forth the supreme law of the land, and are binding on the states and all political subdivisions thereof.

But if the moral value of the exercises was not in question, it was made equally clear that within the limits of their jurisdictional competence, the schools have a right and duty to instill into the minds of the pupils those moral principles which are so necessary to a well-ordered society. It is difficult to conceive of a more compelling function of education than is the molding of the moral strength of the student. Indeed, this function has been a part of the statutory obligations of teachers in Massachusetts since 1789:

"The president, professors and tutors of the university at Cambridge and of the several colleges, all preceptors and teachers of academies and all other instructors of youth shall exert their best endeavors to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice and a sacred regard for truth, love of their country, humanity and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded; and they shall endeavor to lead their pupils, as their ages and capacities will admit, into a clear understanding of the tendency of the above mentioned virtues to preserve and perfect a republican constitution and secure the blessings of liberty as well as to promote their future happiness, and also to point out to them the evil tendency of the opposite vices." Mass. Gen. Laws, Ch. 71, section 30.

To be sure, morality is a subject with which all religion is concerned; but "the separation of church and state" does not imply that civil government and religion may not both seek the same ends.

The Court, then, was concerned only with the difficult and continuing problem of attempting to delineate the proper role of government in matters relating to conscience. The First Amendment's mandate that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" is the embodiment of the great American attempt to obviate the possibility of governmental tyranny over the mind of man. The founding fathers were familiar with the ravages of both body and soul which can result from governmental interference with such personal matters. They determined that the conscience of an individual was never to be the proper concern of civil government. Championed by Jefferson and Madison, the Amendment was designed to implement an unalterable tenet of Jefferson's philosophy:

"Religion is a subject on which I have ever been most scrupulously reserved. I have considered it as a matter between every man and his Maker, in which no other, and far less the public, had a right to intermeddle." Letter to Richard Rush. The Jeffersonian Cyclopedia, Funk & Wagnalls Co., New York, 1900, page 744, No. 7246.

The dual aspect of the Amendment derives from the recognition that tyranny may be exercised not only by suppression; but also by the placing of the great resources of government in support of any form of orthodoxy. The withdrawal of power from government to interfere by either method with the right of a citizen to believe as he sees fit has long been considered to be at the foundation of our society.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Board of Education v. Barnette*, 319 U.S. 624, 642.

Over twenty years ago, the Supreme Court held that this principle is a "fundamental concept of liberty", *Cantwell v. Connecticut*, 310 U.S. 206, 303, and is, therefore, applicable to the states through the Fourteenth Amendment. The Court had reaffirmed this holding on many occasions prior to its reaffirmation again in *Schempp and Murray*. See, e.g., *Engel v. Vitale*, 370 U.S. 421; *Torasco v. Watkins*, 367 U.S. 488; *Murdock v. Pennsylvania*, 319 U.S. 105.

The principles rest on the assumption that "it is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar." *Zorach v. Clauson*, 343 U.S. 306, 324 (dissenting opinion). This assumption is but an application of that which was first enunciated some two thousand years ago.

It is, therefore, improper to view the First Amendment as anti-religious or irreligious; for the Amendment merely directs the government to refrain from interference with man's spiritual fulfillment. The application of this direction, however, is far from clear. Religion and government cannot, in any realistic sense, be entirely disentangled. Substantially all



legislation affects religion to a greater or lesser degree. Many laws arguably can be said to aid some or all religions, whereas the absence of such laws, with equal plausibility, could be held to hinder the free exercise of these same religions. There is no simple formula by which to resolve the many paradoxes which seemingly arise from such situations. Certainly resort to sophistry is of no assistance. In scarcely a dozen words the First Amendment establishes the principles to govern the myriads of confrontations between government and religion. Here, as elsewhere, "the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer." *McCollum v. Board of Education*, 333 U.S. 203, 212 (concurring opinion). The answer must be derived, in each case, by an evaluation of the questioned statute or practice, and an exercise of the most difficult and sensitive constitutional judgment of whether the government has actually and substantially encroached upon an area which is in the exclusive jurisdiction of the individual. In *Schempp and Murray*, the Supreme Court held that the statutes and practices by which portions of the Bible were read and the Lord's prayer was recited at the opening school exercises constituted such encroachments. The Court noted that the primary purpose and effect of the ceremonies were religious. Attendance at schools is compulsory; and by definition, the students are impressionable and look to the teachers for guidance. Under such circumstances, the mere existence of the practices constitutes a serious and meaningful exercise of a primarily religious function: the propagation of a belief in God. Yet ample opportunity for religious activity for those who desired it existed outside the confines of the jurisdiction of school authorities. The Court concluded that under such circumstances, the fusion of the functions of church and state and the endorsement of religion in this matter by government constituted a real threat of substituting government for parent or clergyman in the religious direction of the pupils.

You have requested my opinion of the effect of these cases on other practices. The answers to many of these questions are unclear. *Schempp* and *Murray* stand as isolated pieces of a gigantic picture puzzle. They indicate the contours of a few specific areas, but give little direction to the resolution of the puzzle as a whole. No definitive answers to your questions can be given except by the Supreme Court. Nonetheless, it is my obligation to advise you of the law of the land, as I believe it to be in light of the most recent judicial decisions. To this end, my personal predilections and evaluations of the opinion are irrelevant, and I shall not mention them. Accordingly, I now turn to your specific questions:

1. May the Lord's Prayer be recited on a voluntary basis in the opening class exercises?

In both *Schempp* and *Murray*, students could be excused from participation in the exercises upon request of the parent. In this respect, the exercises could be considered "voluntary." In view of your subsequent questions, I assume that this question relates to practices of the type described above. Such practices, being within the express proscription of the *Schempp* and *Murray* cases, would be invalid.

2. May any prayer be recited on a voluntary basis in the opening class exercises?

As in the previous question, I assume that such a prayer would be recited under the supervision of the teacher or other official; and would be voluntary only to the extent that the students would be entitled to refrain from participation. In *Engel v. Vitale*, 370 U.S. 421, the Court held unconstitutional the reading under such circumstances of the following prayer in the opening exercises in New York schools: "Almighty God, we acknowledge our dependence upon Thee; and we beg thy blessings upon us, our parents, teachers and our country." Few prayers could be formulated to appeal to a wider class of citizens. The basis for the Court's holding was substantially the same as in *Schempp*: that the government has no power to indicate support of religion in such manner and under such circumstances. Since the decision rests on the lack of power in government to engage in this type of activity, as I previously indicated, the "voluntary" nature of the recitation is immaterial. At least to the extent that a prayer invokes the aid of, or recognizes dependence upon a transcendental spirit, then it would be indistinguishable from these cases and could not properly be a part of public school activities.

3. Is vocal prayer barred at any school functions that come under the jurisdiction of the school committee, such as grace before meals in the cafeterias of public schools?

The *Schempp*, *Murray* and *Engel* cases all involve the recitation of prayers in the opening school exercises. I cannot conceive of any constitutional distinction which could be formulated between a prayer at such exercises and a prayer in the lunchroom, if both were conducted under the auspices of the school authorities and as part of the school curriculum. Accordingly, such a recitation of a prayer before meals in the cafeteria of public schools would be unconstitutional. Whether or not vocal prayer would be barred at "any school functions that come under the jurisdiction of the school committee" would depend upon the facts of the particular case. In this connection, compare the above with my answers to questions 8 and 9.

4. Is it legal for a teacher to announce at the opening of school classes in the morning that there will be a moment of silent prayer as the youngsters remain seated and bowing or not bowing their heads?

I have previously indicated that the unconstitutionality of officially sanctioned prayer results from the Supreme Court's holding that the states have no jurisdiction to act in this area. The reasons indicated above for such a holding apply with equal force whether such practices involve a prescribed prayer, the devotional reading of the Bible, or a silent prayer. Accordingly, under the principles set forth by the Court, none can have a proper place in the regular activities of the public schools.

5. Can teachers or students on their own without any direction from school authorities arrange for the recitation of the Lord's Prayer and the reading of the Bible at the opening of class on a voluntary basis? In other words, this practice would not be prescribed by the school committee but would be something that the teacher or the students might do without any direction from the school committee.

To hold that an individual teacher, acting in an official capacity, could effectuate a policy which is beyond the power of her employer to authorize, would create an obvious nonsequitur. The teacher is subject

to the jurisdiction of the school committee, and can act only with its authority or by its leave. See G.L., c. 71, §§ 37, 38, 42. Yet any statute which was so broadly drawn as to allow the school committee to authorize or permit the teacher to conduct prayers would be void. See *McCullum v. Board of Education*, 333 U.S. 203, 206. The teacher is an agent of the state and effectuates its policies. As such, his powers must be circumscribed by the limits of the state's power.

In *Zorach v. Clauson*, 343 U.S. 306, which sustained the validity of a New York "released time" law, the Court said, at 311:

"If it were established that any one or more teachers were using their office to persuade or force students to take religious instruction, a wholly different case would be presented."

There would be no valid distinction between such a case and those postulated in the above question. Accordingly, to the extent such reading and recitation takes place at the instance or under the supervision of the teacher, it would not be proper. To the extent it takes place as a purely voluntary activity of the students, I refer you to answer number 7 below.

6. Is it legal for a teacher to announce at the opening of school classes in the morning that there will be a moment of "meditative silence" or a moment of "reverent silence"?

It is perfectly clear that a moment of meditation amounts neither to a state endorsement of any form of religion or deity nor state prohibition of any matter of conscience. A principle function of secular education is to encourage students to reflect upon problems of serious moment. A pause during the school day for the purpose of encouraging serious thought is entirely consistent with the functions of the state in education, and therefore would be permissible.

7. Is it legal for students to gather in the classroom five minutes before the opening of school on a voluntary basis and recite the Lord's Prayer and read from the Bible?

Implicit in this question are the assumptions (a) that the arrangements are made entirely by the students, without the participation or persuasion of teachers or other school officials; and (b) that at the time the students gather voluntarily in the classroom, it is open for any orderly activities of the students. *Zorach v. Clauson*, 343 U.S. 306, held that the program in the New York schools of releasing children from school activities to attend churches at the request of the parent was valid. *McCullum v. Board of Education*, 333 U.S. 202, held that a similar practice where the religious education was conducted at the premises of the school was invalid. The Court in *Zorach* distinguished the cases on the basis that in *Zorach*, no public classroom or funds were used and that all costs of the program were borne by the religion, 343 U.S. at 309. The extent of the financial involvement of the state in *McCullum*, however, entailed only the wear and tear of the classrooms, and the cost of heat and light and other utilities and were obviously negligible. On the other hand, the Court in *Everson v. New Jersey*, 330 U.S. 1, sustained a program of state aid for transportation to parochial schools. Hence, any distinction between *Zorach* and *McCullum* cannot be predicated on the basis of the amount of state funds involved, but must be on the basis of a judgment that in *McCullum*, the state, by formally placing its facilities at the disposal of

religious institutions, participated in the fostering of religious education to an extent far greater than it did by merely releasing the students. No such participation exists under the facts set forth above. Students may gather in the classroom before supervised activities begin for the purpose of discussion, inspiration or for other orderly purposes. If entirely on their own initiative they decide to utilize that free time in devotion, that is their right. Such a decision would be purely personal and private, and would in no realistic sense involve the state at all. Although the donation by the state of its facilities for religious purposes may in some instances, as in *McCullum*, amount to an unauthorized alliance between church and state, the facts stated above do not establish any such nexus.

8. Is vocal prayer barred at school graduations?

Graduation exercises are in no way similar to those considered by the Court. Attendance is not required. The graduation is not a part of the regular curricular activities, nor is it a necessary or integral part of the educational process. It takes place only once, and then after the process has concluded. The educational achievement of the student is in no way dependent on his physical presence at the graduation. His right to a diploma is earned prior to graduation.

Basically, graduation is merely a ceremonial ritual. Its purposes are to recognize past achievement and to encourage the further pursuit of lofty ideals. I do not think it a "fusion" of function or a "dependence" of government or religion on the other to recognize on such an occasion that most people find inspiration in prayer, and to enlist the support of the clergy, for the benefit of whoever so desires, to further the purposes of the graduation. It would be specious to reason that such recognition entailed a state endorsement of religion in the same manner as did the daily readings and recitations during the basic educational process which were invalidated in *Schempp* and *Murray*.

9. May the traditional baccalaureate exercises be held?

In my opinion there is no distinction in constitutional principle between the facts attendant to baccalaureate exercises and those attendant to invocations and benedictions at school graduations.

10. Is it permissible to teach about the Holy Scriptures and different religions?

It should be clear from what has preceded that the study of the Bible or of religion is a proper part of a program of secular education. The State teaches about many subjects which it does not endorse, because knowledge thereof is essential or desirable to a complete understanding of the subject matter.

Mr. Justice Jackson, concurring in *McCullum v. Board of Education*, 333 U.S. 203 at 235-36, set forth the correct principle as

"Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a "science" as biology raises the issue be-

tween evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity — both Catholic and Protestant — and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

This principle was reaffirmed by the Court in the *Schempp* and *Murray* cases in the following language: "It might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment."

It is, of course, true, as Mr. Justice Jackson observed, in *McCullum*, 333 U.S. at 236, that the exercise of value judgments cannot be shorn from the teaching of religion, the social sciences and the humanities. It would be a sterile school which, for example, merely "laid bare the facts" of the fascist or communist philosophy. Furthermore, a major function of education is to prepare the young mind for the exercise of those difficult judgments which life entails. Yet there remains a distinction between the teaching of religion, with all the necessary incidents thereof, and the practice of religion in school. The line of demarcation is vague; no single factor is likely to be decisive. The propriety of any such judgment would depend upon a series of factors setting the context in which it was exercised: whether or not it was the denouement of an exposition of an entire area; whether the exposition set forth all the competing factors; the extent to which it was expounded in connection with a course of study; the extent to which it was labelled as the teacher's own opinion, with due allowances made for others to hold contrary views; and whether or not the pupils were of an age to understand it as such.

At this point all that can be said is that the teacher and school committee must exercise the discretion vested in them in each case. Disputes in any given case must ultimately be resolved by the courts. Accordingly, with the caveat stated above, it is my opinion that courses in religion are a proper part of secular education and may be taught in the public schools.

11. a. May sectarian observances of religious holidays involving display of religious symbols be held in the public schools?
- b. May songs of a religious nature be sung in public schools?
- c. Traditionally, proclamations have been issued by Governors calling for appropriate observances and prayer on different holidays such as Thanksgiving, Memorial Day and Veterans Day.

There are religious overtones to these holidays. May public schools participate in holiday observances and prayer under the circumstances?

Here again, the questions allude to such a wide range of practices that it would be impossible to set forth a definitive answer. The caveat which I set forth at the end of my last answer applies here. Clearly, the school cannot be substituted for the church either at Christmas or Easter, or at any other time during the year. On the other hand, many of the practices which fall within the purview of your questions, notwithstanding their religious significance, can be a proper part of the public school programs.

Thanksgiving, Veterans Day and Memorial Day are basically patriotic holidays. They involve religion because the history of this nation is inextricably intertwined with religion. Thanksgiving could not be depicted in the schools without reference to the Pilgrims at prayer. Thanksgiving is an important part of the national life. Students learn of the travail of their forefathers, of their industry and frugality, and of the effect of their experience on the subsequent history of the United States. The repetition of the Thanksgiving ceremonies, in my judgment, constitutes not so much an endorsement of religion or of a belief in God, but a reminder of a great period in American history.

The same principles are even more apparent in the ceremonial celebration of Memorial Day and Veterans Day. These holidays, both in inception and perpetuation, are patriotic. That they are permeated with religious overtones is but a recognition of the faith of the overwhelming majority of Americans. The basic purposes of the holidays — honoring the nation's heroes and exalting peace — can be celebrated by all Americans, without reference to religion. We cannot disavow history, because our forebears, in their celebrations, adverted to religious symbols. Were this to be done, there would be little of value left in our national history. The Declaration of Independence, the National Anthem, many of the great utterances of our leaders, would have to be jettisoned, or retained in a new and barren form. It seems clear to me that the state endorsement of these holidays or other matters in their traditional forms amount to nothing more nor less than the recognition of the rich and full history of this country. Such endorsement does not "by any realistic measure create . . . the dangers . . . [The First Amendment] is designed to prevent and . . . do not so directly or substantially involve the State in religious exercises or in the favoring of religion as to have meaningful and practical impact." Goldberg, J., concurring in *Schempp* and *Murray*. The constitutionality of patriotic exercises and songs involving professions of religious belief has gained judicial acceptance. *Engel v. Vitale*, 370 U.S. 421. Since the exercises themselves may take place under the auspices of the government without constituting an "establishment", it is my opinion that a proclamation of the Chief Executive entreating citizens to prayer, if within the spirit and context of the holidays being celebrated, and if in implementation thereof, may constitutionally be complied with. It should be noted, however, that no one can be required to participate in the exercises, *Board of Education v. Bennette*, 319 U.S. 624.

Other factors, deserving separate treatment, relate to Christmas and Easter celebrations. It must be recalled that school activities during these

holidays arise in a different context from those considered in *Schempp* and *Murray*. Being seasonal, the consistency of state participation in religious matters which was present in these cases is lacking in the activities to which the question relates. Furthermore, the fact that great activity involving the holidays is transpiring outside the school cannot be overlooked. Much of this activity might be incomprehensible to a young mind, especially if a non-Christian child. Sensible programs to illustrate the religious history, and universal significance, of these holidays can be significant to the education of American youth. The Christmas and Easter holidays constitute a fact of American life, simply because the population is overwhelmingly Christian. To overlook this fact because of its religious orientation would leave the child in a vacuum.

Plays depicting the origins of Christmas and Easter are of importance in promoting understanding among Christian and non-Christian children; and many schools, according to my understanding, also produce plays of Hannukah and Passover, to complement this purpose. The healthy pluralism of America is likely to stand or fall on the degree of knowledge and understanding which exists among the various groups of society. The public schools are appropriate places in which to develop such understanding.

Being religious in nature, the symbolism cannot entirely be avoided. On the other hand, there can be no doubt that the state cannot participate to such an extent as to amount to an endorsement of the religious dogma of the holidays. Such participation would be unconstitutional. Accordingly, I again can only say that the whole program must be evaluated, with reference to the following, among other, factors: the extent to which symbols, such as a Christmas tree or Nativity scene, were utilized as a part of the overall educational process; the extent to which the universal concepts such as peace on earth and good will toward men were stressed; whether or not ceremonies peculiar to any form of orthodoxy were emphasized; the extent to which the teacher used the seasons to promote understanding and tolerance, as opposed to any particular form of orthodoxy; the extent to which other religions and religious holidays were discussed; the character of religious songs, such as Christmas Carols or more traditional religious hymns, and the extent to which they were sung in connection with the seasonal holidays and as an integral part of the school program relative thereto.

In short, it is my opinion that the public schools have an important role to play during significant religious holiday seasons. Notwithstanding the high religious content of the holidays and of any program relative thereto, the primary purpose of the schools in this matter must be to provide essential and general background and promote understanding.

It cannot be to endorse any particular form of orthodoxy or otherwise to materially enter the area which might properly be considered, as Jefferson said, between "man and his Maker." Where the line between the proper and improper is to be drawn, as I have indicated, cannot be stated categorically. Many varying factors must be considered in each questioned case. But if the state performs its role sensibly and with good judgment, then religious symbols, carols and the like can be an integral part of its program.

12. In case a school committee directs that Bible reading be continued under Chapter 71, Section 31 and the Lord's Prayer recited in the

morning as a regular part of the curriculum, what remedy is available:

- (a) If a parent objects who has a pupil in school?
- (b) If no one objects?
- (c) What is the responsibility of the Department of Education, the Attorney General, or local law enforcement agencies if Bible reading and prayer are continued?

If circumstances have impelled you to seek my opinion on this question, then such circumstances are unfortunate indeed. We must remember that we are here dealing with the Constitution of the United States. This greatest instrument of social organization ever devised by the mind of man cannot lightly be disregarded. Involved in the question are implications which go far beyond the issue of mere disagreement with the decisions in *Schempp* and *Murray*. Involved are nothing less than acceptance of the basic structure of our government and of the principle that, without adherence to law, there is and can be no liberty.

No official of government, of whatever station, can in good conscience disobey the mandate of the Supreme Court. As a citizen, he is entitled to use such legal means as are available to effect a change in the law; but he cannot discharge his official functions otherwise than in a legal fashion.

Massachusetts has a long and noble history of leadership in the struggle for liberty under law. To jettison this heritage at the first occasion of disagreement with the agency duly empowered to render a binding decision would be the ultimate act of hypocrisy.

In answer to your specific questions, I can state as follows:

a.) It would be improper for me to advise any parent of the remedies which may be available to him. This office has no jurisdiction to render advice to private citizens on such a matter. Any parent who may care to may seek such advice from private counsel.

b.) The fact that no one objects does not mitigate the duty of public officials to abide by the ruling of the Supreme Court.

c.) The Department of Education should use its educational facilities to insure that all affected officials are aware of their obligations and will abide thereby.

In the event that, notwithstanding the Department's efforts, violations persist, notice thereof should be given to this office and to local agencies with jurisdiction, all of whom would then be expected to take such action in the premises as is appropriate and within their respective powers.

13. Are there any types of religious or devotional exercises which may be permitted in the public schools?

You will undoubtedly realize from what has preceded that the determination of the validity of any given exercise will depend on many factors. I can only refer you to the cases and the discussion above for the principles involved. Should you request additional advice on the validity of specific exercises as they come to your attention, I shall be happy to oblige.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.



*The Sundays Laws do not require the licensing of musical programs designed only or incidental or background entertainment, including programs, such as Muzak, transmitted by telephone wire or purchased FM radio programs.*

AUG. 28, 1963.

HON. FRANK S. GILES, *Commissioner of Public Safety.*

DEAR COMMISSIONER: — I have received your letter of July 16 relative to the Sunday licensing of Muzak or purchased FM radio musical entertainment. It is my opinion that under § 4 of c. 136 (as amended by St. 1962, c. 616, § 2) such recorded programs for which a charge is made by the radio station need not ordinarily be licensed.

Paragraph (1) of section 4 of the new Chapter 136 authorizes the licensing of any Sunday "game, sport, fair, exposition, play, entertainment or public diversion for which a charge in the form of payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein". Certain exceptions are included which are not applicable here. At a further point, section 4 contains an exemption paragraph which is as follows:

"(6) The provisions of this section in so far as they require a license for the use of radio and television shall not apply to premises licensed under the provisions of section twelve of chapter one hundred and thirty-eight."

The issue is whether or not a specially recorded musical program sold to a subscriber may be construed to fall within the meaning of the term "radio" as used in paragraph (6). The intent of this legislation appears to be to require the licensing of Sunday activities for which the accompanying charge is paid specifically for the purpose of watching or of participating in the particular entertainment. A presentation of a jazz concert on Sunday, for example, for which the public purchased tickets for the purpose of attending, would under the Sunday Law require a license. On the other hand, in cases where the public enters a tavern or restaurant for the purpose of purchasing food or drink, and incidentally background music of the Muzak variety is furnished, it could not be said that relative to the music there was a charge "for the privilege of being present thereat or engaging therein". The charge in such a case is for food, not music. Paragraph (6) specifically exempts radio and television in such establishments: and it is my opinion that — considering the above analysis — the exemption extends to any type of mechanical program which is designed merely as incidental or background entertainment, and not as a primary attraction for which admission fees are actually being charged. The fact that these programs may be transmitted by telephone wire, thus not conforming to the orthodox concept of "radio", need not affect the interpretation of the law.

It should be noted, however, that a proprietor could not lawfully present any program he pleased by purchased radio program or by closed-circuit television. If, for example, a restaurant offered a closed-circuit television presentation of a boxing match to its patrons, charging admis-

sion therefor, clearly, the program would become the prime attraction and, as such, would have to be licensed under the Sunday Law. In the ordinary case of background music such as Muzak, however, I advise you that a license for such an activity is not required by the provisions of Chapter 136.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*An application for a new license is not required when all the stock of a corporation holding a beauty or manicure shop license is sold and the offices changed.*

AUG. 28, 1963.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MADAM: — You have requested my opinion on behalf of the Board of Registration of Hairdressers whether, “When a corporation is sold and the name remains unchanged but changes are made in any or all officers of the corporation, should the corporation file an application for a new shop and pay a registration fee?”

The Board of Hairdressers is authorized by statute to issue certificates of registration to beauty as well as manicure shops.

Mass. Gen. Laws, c. 112, § 87AA:

“The board may authorize one or more registered hairdressers or manicurists or any *person* employing one or more registered hairdressers or manicurists upon payment to the board of a beauty shop or manicure shop registration fee as provided in section 0000, to operate a registered beauty shop or manicure shop and such person or persons may thereafter operate such beauty shop or manicure shop upon payment annually of a beauty shop or manicure shop registration renewal fee as provided in said section 0000. . . .” (Emphasis supplied.)

Under the provisions of this section, it is the practice of the Board to require a shop owned by a single proprietor or a partnership to file a new application and pay an original registration fee when the shop is sold. The present problem arises where the shop is incorporated, and the stock is sold to an individual or group acquiring control of the corporation.

The general rule in construing statutes is that, the word “person” includes corporations, G.L., c. 4, § 7, clause 23. A corporation is an entity distinct from its individual members even though its capital stock has been sold and its officers changed. The corporate entity remains the same, and as a matter of legal principle the corporation is still the “same person.”

The ownership of all the stock and the absolute control of the affairs of a corporation do not make that corporation and the individual owner identical, in the absence of a fraudulent purpose in the organization of the

corporation . . . [*M. McDonough Corp. v. Connolly*, 313 Mass. 62, 66 (1912)]

In light of this well established principle of law and the action taken by the legislature, it is my opinion that when a corporation is sold and the corporate officers are changed, the corporation need not file an application for a new shop and pay a registration fee.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Commissioner of Public Safety may withhold the certificate of inspection of a steam boiler until the prescribed inspection fee has been paid.*

AUG. 28, 1963.

HON. FRANK S. GILES, *Commissioner of Public Safety*

DEAR COMMISSIONER GILES: — You have requested an opinion of this office as to whether the Commissioner of Public Safety may properly withhold certificates of inspection for steam boilers until the prescribed inspection fees have been paid.

The inspection of steam boilers is controlled by Mass. Gen. Laws, c. 146. Under the terms of this chapter, a boiler subject to inspection may not be operated before an inspection certificate has been issued.

No person shall operate or cause to be operated any boiler required by this chapter to be inspected until it has been inspected, and the certificate of inspection required by section twenty-three or twenty-five has been issued and so placed in the engine or boiler room of the plant as to be easily read, or in the case of a portable boiler kept with it and always accessible. *Mass. Gen. Laws*, c. 146, §8.

A certificate of inspection is to be issued after the inspector has examined the boiler and found that it conforms to the rules and regulations promulgated by the board under this chapter.

If, upon inspection, the inspector of the division finds the boiler to be in safe working order, with the fittings necessary to safety, and properly set up, and the boiler and its appurtenances conform to the rules of the board, he shall issue to the owner or user thereof a certificate of inspection stating the maximum pressure at which the boiler may be operated, as ascertained by the rules of the board and thereupon such owner or user may operate the boiler mentioned in the certificate; if the inspector finds otherwise, he shall withhold his certificate until the boiler and its fittings are put in a condition to insure safety of operation, and the boiler and its appurtenances conform to the rules of the board, and the owner or user shall not operate such boiler, or cause it to be operated until such certificate has been granted. *Mass. Gen. Laws*, c. 146, § 23.

Although section 23 is in mandatory form, the word "shall" may at times be construed to be permissive where such construction is necessary to effectuate a legislative purpose or to reach a sensible result.

*City of Boston v. Quincy Market Cold Storage and Warehouse Co.*, 312 Mass. 636, 646 (1942).

*Swift v. Registrars of Voters of Quincy*, 281 Mass. 271, 276 (1932).

The Commonwealth is entitled to be paid for conducting boiler inspections.

The owner or user of a boiler inspected by the division shall pay to the commissioner twenty dollars for each boiler internally and externally inspected, and four dollars for each visit for external inspection under steam, and ten dollars for each cast iron sectional boiler inspected. The commissioner shall pay to the commonwealth all sums so received.

*Mass. Gen. Laws*, c. 146, § 22.

Therefore, it would not, in my opinion, be unreasonable for the Commissioner to require that inspection fees be paid prior to the issuance of an operation certificate. The statutes controlling this matter contain no provision for time of payment; this being the case, it appears that the Commissioner could lawfully regulate the time of payment. In this way, the practical result may be achieved, since the Commissioner would no longer be forced to bring suits to recover small fees owed by licensees who have failed to meet proper inspection expenses.

This result does not conflict with the intentions of the General Laws, but rather implements them. Therefore, it is in my opinion that the Commissioner of Public Safety may properly withhold certificates of inspection for steam boilers until the prescribed inspection fees have been paid.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Only a temporary appointment may be made to a position that permanent incumbent of which is on leave of absence. The applicable statutes indicate that the non-civil service position in the Department of Corporations and Taxation which a person promoted to Deputy Commissioner of Administration held, and to which he has rights if reinstatement, should not be filled by a permanent appointment.*

AUG. 28, 1964.

HON. LEO E. DIEHL, *Commissioner of Corporations and Taxation*

DEAR COMMISSIONER DIEHL: — You have requested my opinion as to whether a vacancy exists in a certain position in the Department of Corporations and Taxation and as to whether you, as Commissioner, have authority to make an appointment to such position.

You state that Mr. Robert H. McClain, Jr. requested and was granted a leave of absence from his position as Chief of Bureau on May 13, 1963. On the same date, Mr. McClain was appointed to the position of Deputy Commissioner for Fiscal Affairs in the Executive Office for Administration and Finance with the approval of the Governor and Council.

Under the provisions of § 4D of c. 7 of the General Laws, as inserted by § 4 of c. 757 of the Acts of 1962, Mr. McClain upon termination of

his services in such position and upon request has the right to be restored to the position from which he was promoted or to a position equivalent thereto in salary grade in the same agency.

As Commissioner, you would be without authority to make a permanent appointment to a position the incumbent of which has been granted a *leave of absence*. However, it is my opinion that as Commissioner, you would be authorized to make a temporary appointment to such position.

If Mr. McClain were to submit his written resignation from his position as Chief of Bureau, relinquishing any and all rights to restoration under Mass. G.L. c. 7, § 4D, assuming § 4D applies to Mr. McClain, a permanent appointment could be made to the then vacated position.

The specific provisions of St. 1953, c. 654, § 106 appear to indicate the Legislature's intent that positions relinquished under the circumstances outlined in your letter should *not* be filled by a *permanent* appointment. That section provides that at no time shall there be more than fifteen non-civil service positions in the Department of Corporations. It is my opinion that if a person has tenure in one of the fifteen positions and rights under § 4D then either his position or the fifteen or another of the fifteen must be left without a permanent incumbent. That is, § 4D is not an authorization for the creation of an additional exempt position for each person with tenure who should accept a supervisory job in Administration.

Having a permanent position filled by a temporary appointee for an indefinite period is not a unique situation. Under St. 1941, c. 708 a public employee who entered military service was given certain employment reinstatement rights. The employee's position was required to be kept open and could only be filled by a military substitute until such time as the permanent incumbent's military service was terminated.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*City ordinances and town by-laws which are not inconsistent with, or repugnant to the rules and regulations of the Department of Public Safety as to the safety of persons and the prevention of fire, in convalescent or nursing and rest homes, would be valid. Under G.L., c. 143, § 3Q any such rule or regulation providing for the installation of a sprinkler system must provide for a hearing before an order for the installation of a system is made.*

HON. FRANK S. GILES, *Commissioner of Public Safety*.

DEAR SIR: — You have requested an opinion of the Attorney General on two questions relating to the application of St. 1963, c. 630, AN ACT AUTHORIZING THE DEPARTMENT OF PUBLIC SAFETY TO PROMULGATE RULES AND REGULATIONS FOR THE SAFETY OF PERSONS AND THE PREVENTION OF FIRE IN CONVALESCENT OR NURSING HOMES AND REST HOMES.

Your questions are as follows:

"In view of the words "Notwithstanding any other provision of law to the contrary," as appearing in lines one and two of Section 3Q of Chapter 143 of the General Laws, inserted by the said Chapter 630, are cities and towns by ordinance or by-law permitted to exceed the rules and regulations promulgated by the Department of Public Safety?

Your opinion is also respectfully requested as to whether the words "after hearing" appearing in line nine of the said Section 3Q refer to the holding of a public hearing prior to the adoption and promulgation of rules and regulations by the Department of Public Safety, or whether the said words "after hearing" require the said Department to grant a hearing to all persons aggrieved by a decision of the Department of Public Safety requiring the installation of a sprinkler system as necessary for the safety of persons."

Section 1 of St. 1963, c. 630, added the following section to G.L., c. 143:

Section 3Q. Notwithstanding any other provision of law to the contrary, the provisions of this chapter relative to the safety of persons and the prevention of fire in convalescent or nursing homes and rest homes licensed under the provisions of section seventy-one of chapter one hundred and eleven, including the regulation of the inspection, materials, construction, alteration and repair of such homes, shall be enforced under rules and regulations promulgated by the department. Such rules and regulations may provide for the installation of a sprinkler system where, after hearing, the department finds such system necessary for the safety of persons; provided, however, that the department may require alternative methods of fire protection where a sprinkler system would be unnecessary or impractical either as to location, size, or construction of a home.

Section 2 of said Chapter 630 reads as follows:

Section 2. Notwithstanding the provisions of section three Q of chapter one hundred and forty-three of the General Laws, inserted by section one of this act, no rule or regulation promulgated by the department of public safety relative to the installation of sprinkler systems in convalescent or nursing homes and rest homes shall take effect prior to January first, nineteen hundred and sixty-five.

Chapter 143 of the General Laws is entitled, "Inspection and Regulation of, and Licenses for, Buildings, Elevators and Cinematographs." The first sentence of the fifth paragraph of G.L., c. 143, § 3, inserted by St. 1945, c. 674, § 1, provides as follows:

"Nothing in this chapter shall be construed as prohibiting any city or town in which the provisions of this section are in force, but subject, however, in the case of a city to the provisions of any special law relative thereto, from imposing, by ordinance or by-law, further restrictions, in accordance with the generally accepted standards of engineering practice and not inconsistent with law, relative to any building or other structure within its limits which is subject to this section; but no such city or town shall have power to minimize, avoid or repeal any provision of this chapter. . . ."

In view of the provision last quoted, I advise you in answer to your first question that it is my opinion that city ordinances and town by-laws which are not inconsistent with or repugnant to any rules and regulations authorized to be promulgated by the Department of Public Safety by G.L., c. 143, § 3Q, would be valid.

In answer to your second question I advise you that it is my opinion that the second sentence of G.L., c. 143, § 3Q, contemplates that a hearing is to be held before the installation of a sprinkler system is to be ordered for any home or homes and that the Department may require alternative methods of fire protection where a sprinkler system would be unnecessary or impractical either as to location, size or construction of a home. That is, the said sentence does not refer to a hearing to be held prior to the adoption of rules and regulations as to sprinklers, but means that any such rules and regulations shall provide that a sprinkler system may be ordered to be installed in a home or homes whenever after a hearing the Department finds such a system is necessary for the safety of persons, provided, however, that the Department may require alternative methods of fire protection where a sprinkler system would be unnecessary or impractical either as to location, size or construction of a home. Of course, the provision of § 3, of G.L., c. 30A, the Administrative Procedure Act, as to notice and a public hearing prior to the adoption of certain rules and regulations by a State agency must be complied with to the extent that they are applicable unless dispensed with as therein provided.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*A person receiving retirement benefits from the Commonwealth may not be employed and paid for services by either the Bureau of Building Construction or the Trustees of the Southeastern Massachusetts Technological Institute.*

AUG. 28, 1963.

JOSEPH LEO DRISCOLL, *President, Southeastern Massachusetts Technological Institute.*

DEAR PRESIDENT DRISCOLL: — You have requested my opinion as to whether Mr. Hall Nichols, a retired state employee receiving retirement benefits under Mass. General Laws c. 32, may be employed and lawfully paid as an approving engineer for either the Bureau of Building Construction or Trustees of Southeastern Technological Institute.

The answer to this question is dictated by the provisions of Mass. General Laws, c. 32, section 91, as amended by St. 1961, c. 367 and by St. 1963, c. 482. It is provided therein:

“No person while receiving a pension or retirement allowance from the commonwealth or from any county, city or town, shall, after the date of his retirement be paid for any service rendered to the commonwealth or any county, city, town or district. . . .”

This section sets forth specific exceptions to the above quoted provisions. A principal object of the statute is considered to be the removal from public service of persons of such an age that they are entitled to receive retirement benefits. Because this is the apparent legislative intent, the exceptions included in the section must be strictly construed. Since Mr. Nichols' employment would not fall within one of the enumerated exceptions, section 91 would preclude the hiring of Mr. Nichols by either of the state agencies specified in the first paragraph of this opinion.

The foregoing opinion renders unnecessary answers to further questions posed by you relative to protection of retirement benefits for Mr. and Mrs. Nichols should Mr. Nichols return to active service with the Commonwealth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The widow of a retired state employee may be permitted to make payments for previous non-consecutive periods of service of her husband to establish the total creditable service in excess of two years required as a condition to the payment of survivor's benefits.*

AUG. 29, 1963.

HON. JOHN T. DRISCOLL, *State Treasurer and Receiver-General*.

DEAR SIR: — You have requested an opinion of this office as to the rights of a widow to receive benefits under the provisions of Chapter 32, § 123 of the General Laws.

You state that the deceased had become a member of the retirement system but had not established credit for the minimum of the two years required. You further state that the deceased had previous service which, when added to the present length of service, would exceed the minimum requirements.

In view of the foregoing you ask whether the widow of such a deceased employee has the right to make payments for previous service in order to establish total creditable service in excess of the two years required and thereby become eligible for benefits as provided in Section 12B.

The widow and children of state employees who fulfill specific statutory requirements may apply to the State Board of Retirement for survivor benefits.

Mass. Gen. Laws, c. 32, § 12B.

If a member in service, including such a member in the uniformed division of the state police, who has not designated a beneficiary under Option (d) of sub-division (2) of section twelve other than his wife and who has two full years of creditable service dies and leaves a wife to whom he had been married for at least one year and with whom he was living at the time of his death or who the board finds had been living apart from said member for justifiable cause other than desertion or moral turpitude on her part, there shall be paid to such widow an allowance of one hundred dollars a month, and if there are any children of said deceased mem-



ber who are under the age of eighteen or over said age and physically or mentally incapacitated from earning on the date of death of the member, an additional allowance of fifty dollars a month for one child plus an allowance of thirty-five dollars for each additional child shall be paid to the widow for the benefit of all such children.

Where the widow and children would come under the provision of Mass. Gen. Laws, c. 32, §12B but for the fact that the deceased had not joined the retirement system, the widow is allowed to receive survivor benefits by making back payments to the retirement fund.

Mass. Gen. Laws, c. 32, § 12C.

The benefits provided for a widow and children under section twelve B shall be paid in like manner to the widow and children of a deceased employee who had completed two years of creditable service and had been married to such widow for one year at the time of his death and who having had the right to become a member of the retirement system failed to become or elected not to become such a member; provided, that there is paid into the annuity savings fund of the appropriate retirement system an amount equal to the deductions that would have been made from his annual compensation had he become a member of the retirement system at the time of his entry into service together with accumulated interest to the date of such payment.

In an opinion of this office dated May 28, 1963, it was stated that a widow may complete payments to the retirement fund where the deceased had made some but not all of the payments required. The present problem deals with the right of a widow to tack two or more non-consecutive periods of service together to make up the minimum two years of creditable service.

The rights which the Legislature have given the widow and children of a deceased are derived from the status of the deceased as a state employee, and are contingent upon meeting the qualifications of these sections. One of these qualifications is that the deceased must have at least "two full years of creditable service."

Mass. Gen. Laws, c. 32, § 12B.

. . . and who has *two full years of creditable service* dies and leaves a wife . . . (emphasis supplied)

Mass. Gen. Laws, c. 32, § 12C.

. . . shall be paid in like manner to the widow and children of a deceased employee *who had completed two years of creditable service* . . . (emphasis supplied)

These sections are not to be read alone. They are part of a comprehensive system of retirement benefits and must be construed in light of the other provisions of Chapter 32.

Nevertheless, as stated at the outset, the question now before us is purely one of statutory construction. As to such a question reference should first be had to the statutes themselves for such assistance as may be derived from their language, their chronology, and their form and structure with

relation to each other . . . [*Sachs v. Board of Registration in Medicine*, 300 Mass. 426, 428 (1938)]  
 The provisions of the present statute do not call for continuous service. Tacking is not prohibited. These sections should be compared with other sections of the retirement law which specifically call for consecutive years of service.

Mass. Gen. Laws, c. 32, § 3.

(e) Anything in sections one to twenty-eight inclusive to the contrary notwithstanding, no person who becomes a member under subdivision (3) of this section, and no member who is reinstated to or who re-enters active service as provided for in paragraph (b), (c) or (d) of this subdivision, or who transfers or re-establishes his membership as provided for in subdivision (8) of this section, shall be eligible to receive a superannuation retirement allowance or a termination retirement allowance unless and until he shall have been in active service for at least *two consecutive years* . . . (emphasis supplied)

The Board is authorized by statute to ascertain the number of years of creditable service where the term of employment is not consecutive.

Mass. Gen. Laws, c. 32, § 4.

(2) (b) The board shall fix and determine how much service in any calendar year is equivalent to a year of service. In all cases involving part-time, provisional, temporary, temporary provisional, seasonal or intermittent employment or service of any employee in any governmental unit, including such employment or service of any state official or of any person elected by popular vote to a county or municipal office or position, the board, under appropriate rules and regulations which shall be subject to the approval of the actuary, shall fix and determine the amount of creditable prior service, if any, and the amount of credit for membership service of any such employee who becomes a member, including any prescribed waiting period before eligibility for membership, established either by law or board ruling, prior to January first, nineteen hundred and forty-six, for which such service credit was given upon attaining membership; provided, that in the case of any such employee whose work is found by the board to be seasonal in its nature, the board shall credit as the equivalent of one year of service, actual full-time service of not less than seven months during any one calendar year.

Having been given this authority by statute, it would be within the discretion of the Board to find that the deceased had "two years of creditable service" within the meaning of this term as used in Mass. Gen. Law, c. 32, §§ 12B, 12C where the employment is not consecutive. However, being a derivative right, the widow could not tack two or more non-consecutive periods where by statute the deceased would not have enjoyed the same privilege.

In light of these statutory provisions pertaining to retirement benefits, it is my opinion that it would be within the discretion of the Board of Retirement to allow a widow under the provisions of 12B in a situation where her husband had become a member of the retirement system but had not established credit for the minimum of two years required and

who had previous service which when added to the present length of service would exceed the minimum requirements to tack together these two non-consecutive periods of service in a situation where the deceased would have enjoyed the same privilege.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*It is doubtful that the Constitution can be amended through a Constitutional correction called, or proposed, by an initiative petition, and the petition, since the Executive Council is designated as a permitted subject, may contain "excluded matters," and the variety of permitted subjects of amendment makes it doubtful that the petition "contains only subjects . . . which are related or mutually dependent."*

*Despite doubts expressed, in view of the short time petitions have to obtain the required signatures and since the Legislature if the measure is quailed, can seek an opinion of the justices of the Supreme Judicial Court, the Attorney General, resolved the doubts in favor of this petition, certified the petition and prepared a "fair concise summary" thereof.*

SEPTEMBER 3, 1963.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*

DEAR SIR: — The attached initiative petition entitled "AN ACT TO ASCERTAIN AND CARRY OUT THE WILL OF THE PEOPLE IN 1966 RELATIVE TO THE CALLING AND HOLDING OF A CONSTITUTIONAL CONVENTION IN 1967 TO DEAL WITH SUBJECTS LIMITED TO THE REVISION, ALTERATION AND AMENDMENT OF THE STRUCTURE OF GOVERNMENT; AND TO PROVIDE FOR A PREPARATORY COMMISSION THEREFOR" was submitted to me, prior to the first Wednesday of August of the current year, by Mr. John M. Hill, II. in accordance with Article 74 of the Articles of Amendment to the Constitution of the Commonwealth.

There are strong indications that the measure is not in proper form for submission to the people. The measure contemplates amendment of the Constitution of the Commonwealth in a manner entirely different from that provided by the Initiative and Referendum Amendment. The result is that the Constitution would be amended by procedures substantially less burdensome than was intended. In addition, the measure appears to contain "Excluded matters", since the Executive Council is designated as a permitted subject for consideration and therefore the area of appointment of judges may be affected. Finally, the measure contemplates such a variety of amendments that it is doubtful that "it contains only subjects . . . which are related or which are mutually dependent".

However, the time in which to obtain the signatures necessary to qualify the petition for legislative action is so short that any delay would

probably make the task impossible. It would be very unlikely that judicial proceedings to review an unfavorable determination by this office—even if successful—could be completed in time to allow the petitioners to obtain the required signatures. On the other hand, once the petition is presented to the Legislature, that body may—as it has done in the past—seek an opinion of the Justices of the Supreme Court as to whether the proposed measure complies with the initiative provisions of the Constitution.

Because of the seriousness of the reservations I have voiced as to the form of this petition, I would, if time permitted, personally seek through appropriate legal proceeding, a ruling from the Justices of the Supreme Judicial Court as to the validity of this measure.

But as I have pointed out, the members of the General Court may seek, once the petition has been presented to them, an advisory opinion on the same point. It seems to me that the best interests of all the people of the Commonwealth would be served if the members of the General Court followed this procedure. The rights of the petitioners would in no way be compromised or injured by such a course of action while the rights of the public would, simultaneously, be fully protected.

Consequently, with the reservation that there exist the serious doubts set forth, which doubts are being resolved in the petitioners' favor only because a contrary decision would most probably deprive them of an opportunity to qualify the measure for submission to the Legislature, I hereby certify with respect to the attached initiative petition (signed by ten voters certified to be qualified voters of the Commonwealth) that such measure and the title thereof are in proper form for submission to the people, and that the measure is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people at either of the two preceding biennial State elections, and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent.

In accordance with the constitutional provisions cited above, I have prepared "a fair, concise summary" of the measure as follows:

#### SUMMARY

The proposed measure, if adopted, will place upon the ballot at the 1966 biennial State election the question whether or not there is to be a Constitutional Convention, to be held in the year 1967, for the purpose of revising, altering or amending the Massachusetts Constitution, thereby affecting the structure of government of the Commonwealth. If the electorate chooses to hold such a Constitutional Convention, the present measure will regulate the Convention's functioning. There shall be a total of 102 delegates, selected as follows: 10 from the House of Representatives, 10 from the Senate, 10 at large, and 6 from each of the 12 Congressional districts. The measure provides for the nomination and election of delegates, and for replacement of elected delegates where necessary.

If voted upon favorably, the Convention shall open in July of 1967, and shall remain open for no more than 120 calendar days. The Convention delegates shall select their own officers and establish procedural

rules as set forth in the measure. The purpose of the Convention is the revision, alteration and amendment of the Constitution of the Commonwealth, and the Convention shall be limited to consideration of the following: Number, terms and method of choosing constitutional officers of the Executive Branch and members of the General Court; the Executive Council; government of counties and municipalities, and their relationship to each other and to the State government; organization of the executive and administrative work of the Commonwealth; and methods of amending the Constitution of the Commonwealth. Notwithstanding anything otherwise provided, there shall be no consideration of any matter relating to the Declaration of Rights of the Inhabitants of the Commonwealth; to Judiciary Power; to Taxation; or to a particular city, town or county. All proposed changes shall be submitted to the people at the 1968 biennial State election, and shall not go into effect unless ratified by the people. Provision is made for quarters and compensation for the delegates.

If the electorate chooses to hold the proposed Convention, there shall be selected as provided a Constitutional Convention Preparatory Commission, whose purpose shall be the compiling, prior to the Convention, of whatever information it is deemed will be of assistance to the delegates in the work of the Convention.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

SEPTEMBER 3, 1963.

*A prisoner whose life sentence has been commuted to a period of years to life is no longer "serving a life sentence," and may be removed to a prison camp.*

HON. GEORGE F. McGRATH, *Commissioner of Correction*

DEAR SIR: — I have received your letter of August 13, 1963 relative to the interpretation of section 83B of Chapter 127 of the General Laws. You ask whether or not a prisoner whose life sentence was commuted to a sentence of from 32 years to life may be removed to a camp under the provisions of said section.

Section 83B provides:

"The commissioner may remove to any camp so established any prisoner held in a correctional institution of the commonwealth, except the Massachusetts Institution, Framingham, and sentenced prisoners in jails and houses of correction, *except a prisoner serving a life sentence*, or a sentence imposed for violation of sections twenty-two, twenty-three and twenty-four of chapter two hundred and sixty-five and for attempt to commit a crime referred to in said sections, who, in his judgment, may properly be so removed and may at any time return such prisoners to the prison from whence removed. . . ." (Emphasis supplied.)

I am assuming for purposes of this opinion that the prisoner in question is not serving a sentence imposed pursuant to one of the enumer-

ated excepted sections. The statute excepts from its provisions prisoners "serving a life sentence". The sentence served is not always synonymous with the sentence handed down by the trial court. Sentences frequently are commuted, and the prisoner serves only the more lenient term. Since the statute specifically uses the word *serving*, I am of the opinion that reference is intended to be to the term of years ultimately determined to be inflicted upon the prisoner rather than to the sentence originally declared but later reduced.

There may be some doubt as to whether reduction of a sentence from "life" to "from 32 years to life" actually removes the sentence from the category of life imprisonment. Clearly, however, the latter is more lenient treatment, both in the sense that the prisoner may serve less than a life term and in the fact that parole may be considered at an earlier date. Since in practice a sentence of this type frequently terminates at some point less than life, it is safe to say that the sentence currently imposed upon the prisoner in question does not amount to life imprisonment.

Therefore, following the above analysis it is in my opinion that the prisoner involved is not currently "serving a life sentence", and that he may as a result be transferred to a prison camp pursuant to the provisions of G.L., c. 127, § 83B.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The use of an armory for dog obedience training classes may be permitted.*

SEPTEMBER 3, 1963.

COLONEL RALPH T. NOONAN, *State Quartermaster*

DEAR COLONEL NOONAN: — You have asked me whether the certain non-military use of an armory for dog obedience training classes is permitted under Massachusetts General Laws, c. 33, § 122.

Paragraph (e) of the said § 122 provides that an armory may be used for "athletic contests and social or *civic activities* conducted by responsible organizations or associations." (Emphasis supplied.) With today's use of dogs for multiple and varied civic purposes including those such as police training and duties guiding the blind, it is clear that the statutory word "civic" would include dog obedience training classes. With this definition in mind, it is evident that a dog obedience class can be classified as a civic activity and thus within the scope of paragraph (e). The proper training of dogs is germane to the health, safety and general welfare of the citizenry.

There is one limitation upon the use of an armory to prevent abuses. The activity must be "conducted by a responsible organization or association." Within this limitation, it is my opinion that dog obedience training classes can be conducted in armories under c. 33, § 122 (e).

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Metropolitan Transit Authority has authority to take land from the Boston and Maine railroad for the construction of the proposed rapid transit extension to Reading.*

SEPTEMBER 3, 1963.

COMMISSIONER JACK F. RICCIARDI, *Commissioner of Public Works*

Re: Section 12, Chapter 782, Acts of 1962  
*Veto Power of Certain Cities and Towns*

DEAR COMMISSIONER: — You have requested an interpretation of Section 12, Chapter 782, Acts of 1962 which provides that no money shall be expended under that act until the projects enumerated therein have been approved and accepted by designated officials of the cities and towns listed therein. You have specifically asked the following questions in connection with the meaning of the words, “. . . until such projects have been approved and accepted . . .” as used in said Section 12, Chapter 782, Acts of 1962:

1. Do the quoted words mean approve and accept the concept of the highway? or
2. Do the quoted words mean approve and accept the exact location of the highway? and
3. Does said Section 12 grant the power to approve and accept the actual geometric design of the highway to the cities and towns?

Section 12 of Chapter 782, Acts of 1962 states: “No money shall be expended under this act by the state department of public works for projects in the towns of Brookline or Saugus, or the cities of Boston, Cambridge, Lynn, New Bedford, Peabody, Revere, Somerville or Springfield until such projects have been approved and accepted by the selectmen of said towns, the mayor of the city of Boston, Lynn, New Bedford, Peabody, Somerville or Springfield or the city manager of the city of Cambridge or Revere.”

The initial use of the word, “projects” in said Section 12 is an unambiguous description of the total highway activity described in said Chapter 782. The language of said section 12 does not limit the meaning of “projects” by delineating specific components of total highway activity such as location or design.

It is my opinion that the officials of the cities and towns listed in said Section 12 have the power to approve and accept the concept of highways, the exact location of highways, and the actual geometric design of highways included in projects set forth in Chapter 782, Acts of 1962. The exercise of these powers by specific officials is limited geographically to those portions of highway projects within the boundaries of the cities or towns which have elected or appointed them to office. Until the local officials designated in said Section 12 exercise the powers conferred upon them by said Section 12, no money may be expended on the projects set forth in Chapter 782, Acts of 1962 which will be in the communities listed in said Section 12.

It is also my opinion that once the designated official of a city or town gives approval to a Chapter 782 project neither he nor any other representative of that community may interfere with any of the details of

that project on the basis of Section 12 of said Chapter 782. All suggestions, objections and amendments must be raised by those officials prior to acceptance and approval.

It is my further opinion that no city or town listed in Section 12, Chapter 782, Acts of 1962 or any official thereof may at any time unreasonably disrupt the progress of a Chapter 782 project with impunity. The official designated in said Section 12 is obliged to give or withhold acceptance and approval or to negotiate changes or compromises at the hearing stage. The powers conferred upon local officials by Section 12 may not be used arbitrarily or may not be arbitrarily left unexercised. If acceptance and approval of a proposed project is denied or withheld it is the duty of the local official designated in said Section 12 who so acts or fails to act to advise in writing within a reasonable time the agency or department of the Commonwealth, which submitted the project, of the specific reasons for rejection of or failure to act on the project within the particular city or town.

Delegation of the powers set forth in said Section 12 is unique. Those powers and the exercise thereof shall therefore be strictly construed. They may not be abused to the detriment of the Commonwealth. I shall not comment in this opinion on the responsibility and possible liability of individual officials or of cities or towns for loss or damage to the Commonwealth if they were found by an appropriate tribunal to have abused such powers by failing to act within a reasonable time or by acting unreasonably.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The "veto" power of certain local officials under St. 1962, c. 782 (accelerated Highway Act), extends to the entire local portion of each highway project.*

SEPTEMBER 3, 1963.

COMMISSIONER JACK P. RICCIARDI, *Department of Public Works*  
Re: *Metropolitan Transit Authority Eminent Domain Power*

DEAR COMMISSIONER: — On July 25, 1963 you asked for my opinion on the following question:

"Does the Metropolitan Transit Authority under its power of eminent domain have the authority to take land from the Boston and Maine Railroad for the construction of the proposed rapid transit extension to Reading?"

It is my opinion that the Metropolitan Transit Authority has the power to take by eminent domain the property of a railroad corporation such as the Boston and Maine Railroad.

The Appendix to Chapter 162 of the General Laws of the Commonwealth in Section 1-1 confers upon the Metropolitan Transit Authority the power to take property by eminent domain and by describing that Authority as "a body politic and corporate and a political subdivision of the Commonwealth" The General Court granted plenary power of



eminent domain to it. The Transit Authority may therefore proceed under the terms of Section 7 of Chapter 160 of the General Laws which provides:

"The Commonwealth may, at anytime after one year's written notice to a railroad corporation, take its railroad, franchise and other property by eminent domain under Chapter seventy-nine."

Chapter 633 of the Acts and Resolves of 1963 provides for the new extension to Reading. It includes the following restatement of the power of the Metropolitan Transit Authority to take property by eminent domain to implement that statute:

"The Authority may acquire, either by purchase, or by eminent domain, under chapter seventy-nine of the General Laws such portion of the railroad properties and other properties in the cities where the rapid transit line is to be built as the Authority may determine to be necessary for such rapid transit line and its appurtenances."

No provisions of Chapter Seventy-nine of the General Laws inhibit or restrain the power conferred on the Metropolitan Transit Authority to take by eminent domain the property of a railroad corporation.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Proceeds of the bond issues for the Accelerated Highway Program may be used to pay charges for office equipment to be used by the Department of the Attorney General in connection with land damages claims, and for leaving automobiles for the use of the personnel of the Right of Way Division.*

SEPTEMBER 3, 1963.

COMMISSIONER JACK P. RICCIARDI, *Department of Public Works*

Re: Bond Issue Accounts — Authority to Purchase, Rent or Lease Equipment.

DEAR COMMISSIONER: — You have asked for my opinion on whether or not the Department of Public Works can purchase, rent or lease office equipment for the Department of the Attorney General and charge the cost thereof to a Bond Issue Account.

Chapter 306 of the Acts & Resolves of the General Court of 1949, Chapter 685 of the Acts & Resolves of 1950, Chapter 556 of the Acts & Resolves of 1952, Chapter 403 of the Acts & Resolves of 1954 and Chapter 718 of the Acts and Resolves of 1956 authorize the issue and sale of bonds to meet expenditures necessary to execute the accelerated highway program. Included in each of those laws is the following language:

"The cost of the work . . . shall include all project payments, property damages, expenses for consultants and engineering services . . . and for all legal and other technical and expert services, and incidental expenses in connection with the projects herein authorized."

The language quoted above makes it clear that the General Court intended that all legal expenses and services incidental thereto should be included in the cost of the work to be paid from the proceeds from the sale of the bonds which were authorized and issued.

Almost all of the cases and matters handled in the Contract and Eminent Domain Divisions of the Department of the Attorney General arise from activities of your Department in connection with the execution of the purposes set forth in the laws listed in the third paragraph of this letter. It has long been established that the compensation of the personnel of the Contract and Eminent Domain Divisions of the Department of the Attorney General may be and is paid from the various Bond Issue accounts. It is evident that legal services cannot be rendered without the employment of administrative and clerical assistance and the use of office equipment of various types.

It is my opinion that the Department of Public Works can purchase, rent or lease equipment for the use of the Contract Division and Eminent Domain Division of the Department of the Attorney General and charge the costs thereof to an appropriate Bond Issue Account.

Your letter of August 12, 1963 also asked if the Department of Public Works has the authority to lease automobiles for employees, such as those in the Right of Way Division, who are working primarily on projects financed from bond accounts.

The activities of employees of the Right of Way Division of your Department are directly connected with the determination of "property damages" as those words are used in the statutes cited in the third paragraph of this letter. The transportation of the personnel involved in those activities is an appropriate "incidental expense" as those words are used in said statutes. The cost of that transportation, whether for the leasing of automobiles, or the purchase and maintenance thereof, or for various forms of public transportation, can be paid from the Bond Issue Accounts cited herein provided those costs are directly connected with the projects authorized and financed in said cited statutes.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The commissioner of insurance cannot permit a life insurance company to delay compliance with the statute as to payment of unclaimed funds pending any decision by the Supreme Court of the United States as to its constitutionality.*

SEPTEMBER 6, 1963.

HON. C. EUGENE FARNAM, *Commissioner of Insurance*

DEAR SIR: — I have received your letter of August 20, 1963 in which you request an opinion relative to the duties of the Commissioner of Insurance under Chapter 175 of the Massachusetts General Laws. You have asked whether the Commissioner of Insurance must, pursuant to § 149C of c. 175, demand that the Metropolitan Life Insurance Company pay over unclaimed funds to the State Treasurer on or before September 1, 1963, or — as an alternative — if he may accept an agree-

ment that such funds will be paid as soon as a decision of the United States Supreme Court indicates that the Commonwealth is entitled to them.

General Laws, c. 175, § 149A defines unclaimed funds as "monies . . . which shall have remained unclaimed and unpaid for seven years or more after . . . such monies became due and payable . . . and which monies are payable to a person whose last known address is within this commonwealth. . . ." Section 149B as amended provides that every life company shall . . . on or before April 1 . . . make a report to the Commissioner of Insurance of all such unclaimed funds held by the company on the preceding December 31st.

The disposition of such unclaimed funds is governed by c. 175, § 149C:

"On or before the first day of September in each year, each life company shall pay over to the state treasurer all unclaimed funds set forth in the report required by section one hundred and forty-nine E, excepting any funds which since the date of such report have ceased to be unclaimed. Each such payment shall be accompanied by a duplicate of the report made under section one hundred and forty-nine B, together with a statement with respect to any funds which since the date of such report have ceased to be unclaimed."

The matters covered in these statutes are not left to the discretion of the Commissioner of Insurance; the statutes impose an obligation upon the Commissioner to receive written reports and to demand timely payment over to the state treasurer of unclaimed funds.

"The commissioner shall administer and enforce the provisions of this chapter and chapter one hundred and seventy-six, and, so far as is provided therein, chapter one hundred and seventy-eight. If upon complaint, examination or other evidence exhibited to him he is of the opinion that any provision of said chapters has been violated, he shall forthwith report the facts to the attorney general, to the proper district attorney or to the commissioner of public safety, who shall cause the offender to be prosecuted therefor."

*Mass. General Laws, c. 175, §3A.*

It is the function of the Commissioner of Insurance to enforce these provisions, not to determine whether they are desirable or even constitutional. Pending judicial determination as to the statute's validity, the only course of action open to the Commissioner is to enforce the provisions of the law as enacted by the Legislature. It is my opinion that the Commissioner is not the appropriate party to decide whether the law is valid, or even to grant life companies a delay pending decision by the United States Supreme Court. The statute as currently in effect requires the Commissioner to demand timely payment by Metropolitan Life over to the state treasurer.

I am aware of the effect of *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, decided by the United States Supreme Court in 1961, that a state judgment of escheat which does not bar another state from escheating the same property is void under the Due Process Clause of the Fourteenth Amendment. It is true that similar cases are pending in

the United States Supreme Court, and that Metropolitan Life has no guarantee that payment to this Commonwealth will end the matter. However, it is not the function of either the Commissioner of Insurance or the Attorney General to suspend enforcement of properly enacted legislation. Such matters are within the province of the courts; Metropolitan Life is free to seek a temporary restraining order in court, as apparently it has done in other cases. Pending some judicial word on the subject, however, state officials can only enforce the law as it is written.

Consequently, pursuant to the above discussion, it is my opinion that the Commissioner of Insurance does not have the authority to delay payment of unclaimed funds over to the state treasurer pending decisions by the United States Supreme Court. Rather, the Commissioner must demand that such payment over be made on or before September 1, 1963.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*An application for a certificate of registration for a "mobile" barber shop cannot be rejected for alleged inability to properly supervise such a shop.*

SEPT. 6, 1963.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MRS. SULLIVAN: — You have asked for my opinion as to whether the Board of Registration of Barbers would have the power and be within their rights to reject an application for a mobile barber shop. The basis for their rejection of such an application would be the inability of their inspectors to properly supervise such a shop.

The applicable section of the Mass. General Laws, c. 112, § 87H, states in part:

"Any person desiring to obtain a certificate of registration shall make application to the board therefor, pay to the secretary thereof a fee of fifteen dollars and furnish to the board a certificate of a registered physician as to the freedom of the applicant from infectious and contagious diseases, and shall present himself at the next regular meeting of the board for the examination of applicants, or at a later meeting of the board if it so votes, and thereupon, if he shows that he has studied and practiced the occupation of barbering for two years as an apprentice under one or more registered barbers, or for at least six months in a properly equipped and conducted barber school or barber college under the instruction of a registered barber and eighteen months as an apprentice under a registered barber, or practiced such occupation for at least two years in this and/or other states, and that he is possessed of the requisite skill in such occupation to perform properly all the duties thereof, including the preparation of the tools, shaving, haircutting and all the duties and services incident thereto, and has sufficient knowledge con-

cerning diseases of the face and skin to avoid the aggravation and spreading of such diseases in the practice of such occupation, the board shall issue to him a certificate of registration, signed by the chairman and the secretary and attested by its seal. Such certificate shall be evidence that the person to whom it is issued shall, subject to section eighty-seven J, be entitled to follow the practice of the occupation referred to therein.

“ . . . Before any registered barber opens a barber shop, or moves his barber shop to a new location, or operates a barber shop previously approved for a prior owner, he shall apply to the board for an inspection and approval thereof, and the board shall receive a fee of fifteen dollars for each inspection, and, upon the approval of such barber shop, the board shall issue a certificate of registration for such barber shop, which shall without further fee be in force, unless sooner cancelled, suspended or revoked, until June thirtieth of the year following the year of its issuance. . . .”

Your letter recites that the inability of the inspectors to properly supervise such a shop stems from that provision in the section which requires the barber to apply to the Board for an inspection and approval before such barber “opens a new barber shop, or moves his barber shop to a new location, or operates a barber shop previously approved for a prior owner”. The Board, placing emphasis on the word “moves”, interprets this provision to require new certification every time the mobile shop drives to a new location.

The vital question is what the Legislature intended by use of the phrase “or moves his barber shop to a new location”. It is my opinion that the Legislature did not intend to require a mobile barber shop to obtain a new certificate every time the shop moves. This conclusion is reached after viewing the section in its entirety and ascertaining the object of the certification requirement. The Legislature requires such certification to protect the health of the citizens which the shop serviced. It is the inspection and the certification of the facilities with which the section is concerned and it is the changing of the facilities which requires recertification. This, I feel is the meaning of the phrase in question. A mobile barber shop would require new certification when the barber acquired a new vehicle and shop. This would involve a “moving” within the meaning of section 87H.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The two members of the Board of Registration of Real estate Brokers and salesmen, who are designated as “representatives of the public” may not be licensed real estate brokers.*

SEPT. 12, 1963.

MR. JOHN W. McISAAC, *Chief Examiner, Board of Registration of Real Estate Brokers and Salesmen.*

DEAR SIR: — I have received your letter of August 19, 1963 relative to the composition of the Board of Registration of Real Estate Brokers and Salesmen. You have asked whether the two members of the Real

Estate Board who are designated "representatives of the public" may also be licensed real estate brokers.

Appointments to the Board are governed by Mass. G.L. c. 13, § 54, as amended, the relevant part of which reads as follows:

"There shall be a board of registration of real estate brokers and salesmen, in this section and in sections fifty-five to fifty-seven, inclusive, called the board, to be appointed by the governor, with the advice and consent of the council, consisting of five members, citizens of the commonwealth, three of whom shall have been actively engaged in the real estate business as a full-time occupation for at least seven years prior to their appointment and who shall be licensed real estate brokers, and two of whom shall be representatives of the public. . . ."

The question presents a problem in statutory construction. Ordinarily, when the Legislature designates that a specific number of individuals will, for example, perform a function or — as in the present case — present a particular qualification, it is implied that other persons mentioned in the statute will *not* perform such duties and need *not* offer such qualifications. It is a standard rule of construction that express mention of items or individuals implies exclusion of those items or individuals to which reference has not been made. In the present matter the General Court has provided that three of the five members of the Board of Registration of Real Estate Brokers and Salesmen must have been actively engaged full-time in the real estate business for seven years and be licensed real estate brokers. No indications to the contrary being present, it must be assumed that these three alone may be licensed brokers.

The apparent intent of the General Court supports this conclusion. The Legislature appears to have contemplated dividing the Board between representatives of the real estate field and representatives of the public. Deliberations of a regulating agency such as the Real Estate Board frequently have a broader scope when a variety of interests are represented rather than simply the interests of practitioners alone.

Therefore, since it is apparent that the General Court intended that the interests of the public at large be represented on the Board by two members not practitioners in the real estate field, it is my considered opinion that the two individuals designated "representatives of the public" may not be licensed real estate brokers.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Discussion of duties of, and procedures for, superintendent of state for, in connection with a request for payment from funds held for an inmate for an attorney's retainer fee.*

SEPT. 13, 1963.

HONORABLE GEORGE F. McGRATH, *Commissioner of Correction*

DEAR SIR: — You have requested my opinion as to whether the Superintendent of the Massachusetts Correctional Institution at Bridgewater (the "state farm", see G.L. c. 125, § 1) must honor an order of an inmate of the Bridgewater State Hospital to pay money from funds deposited

to the inmate's personal account as retainer fee to a lawyer designated by the inmate. Such account was created from funds earned by the inmate at the hospital, from social security payments, veterans benefits or gifts received for the inmate during his confinement.

Bridgewater State Hospital as a mental institution, whose inmates are committed for treatment by judicial order. See G.L. c. 125, s. 19, and references therein. It is, nonetheless, a part of the state farm, G.L. c. 125, § 18, subject to the jurisdiction of the Commissioner of Correction and under the control of the superintendent of the state farm. G.L. c. 123, § 22A.

The superintendent's authority with respect to money earned by an inmate for services performed at the institution is set forth in G.L. c. 127, § 48A, which provides in part:

"The superintendent of any correctional institution may expend one half of the money so earned by any inmate on behalf of the inmate; provided, however, that in the case of an inmate who is a defective delinquent or a sexually dangerous person or who is serving a life term, the superintendent may so expend any part or all of such money. The remainder of the moneys so earned, after deducting amounts expended on behalf of the inmate as aforesaid, shall be accumulated to the credit of the inmate and shall be deposited by the superintendent as trustee in a bank approved by the state treasurer and paid to the inmate upon his release from such institution in such instalments and at such times as may be described in . . . rules and regulations."

The services of an attorney cannot be considered "articles" under any reasonable definition of that term. Accordingly, the superintendent has no authority to expend any part of an inmate's account which represents accumulated deposits of money earned as described in § 48A for the payment of lawyer's fees.

No specific statute, however, defines the superintendent's authority over that part of the account which represents accumulated deposits of receipts mentioned in your inquiry. Section 3 of c. 127 relates only to money or property "found in the possession of prisoners committed" to an institution; and no statute vests in the superintendent broad power to use an inmate's funds from any source for the benefit of such inmate comparable to that given to the Commissioner of Mental Health with respect to patients under his supervision. See G.L. c. 123, § 39. In the absence of any specific statute, an inmate is entitled to the immediate use of the payments you describe; and if the superintendent holds such payment or deposits them into his own account, he becomes a debtor on demand of the inmate. As such, he must pay any part or all of the debt upon the order of the inmate creditor.

It may be, however, that such an inmate lacks the mental capacity either to engage an attorney or to issue an order for the payment of funds. The order of commitment itself is not conclusive of his lack of such capacity. See *Mitchell v. Mitchell*, 312 Mass. 165, 168; *Leggate v. Clark*, 111 Mass. 308. Although an inmate may be sufficiently mentally ill to justify his commitment for treatment, he may possess, nonetheless, sufficient mental capacity to incur rights and obligations and to dispose of his property. Whether or not any ostensible agreement between an inmate and an attorney is valid, voidable or utterly void will depend

upon a series of factors relating to the inmate's mental condition, which will vary from case to case and none of which you have given me. See, e.g., *Farnum v. Brooks*, 9 Pick. 212; *Hallett v. Oakes*, 1 Cush. 296; *Allis v. Billings*, 6 Metc. 415. Obviously, the superintendent ought not to comply with something which, although resembling an order in form, bears none of the real attributes thereof. Furthermore, in such a case, unless a lawyer's services amount to a "necessary of life," the lawyer might not be entitled even to the fair value of his services. *Hallett v. Oakes*, *supra*.

The dilemma of the superintendent when dealing with funds of inmates of doubtful mental capacity cannot be gainsaid. In the absence of statutory amendment, I would advise the superintendent, when possible, to procure an indemnity bond or other suitable means of protecting the Commonwealth and the inmate's estate from improper depletion, or to request the Department of Mental Health or other person referred to in G.L. c. 201, § 6, to petition for appointment as guardian of the inmate in question.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The provisions of the Fair Employment Practices Act as to discrimination on account of age do not affect the operation of the provision of the retirement law, restricting benefits to persons becoming employed under age sixty.*

SEPT. 18, 1963.

MR. WALTER H. NOLAN, *Executive Secretary, Commission Against Discrimination*.

DEAR SIR: — I have received your communication on August 28, 1963, requesting an opinion relative to the right of certain employees of the Boston School System to enjoy membership in the contributory pension system administered by the Boston Retirement Board. You have asked whether such employees hired after age sixty, are entitled to the advantages of the contributory pension system on the basis of the Fair Employment Practices Law (G.L. c. 151B) despite the prohibitions of § 3, of c. 32, the Retirement Law.

Section 3 of Chapter 32 (as amended) indicates that employees joining the services of the Commonwealth after age sixty are not eligible for the contributory pension system.

"(2) *Eligibility for membership.*

"(a)

"(IV) Any person, except as specifically otherwise provided for in sections one to twenty-eight, inclusive, who, while under age sixty, enters or re-enters the services as an employee of the commonwealth, a teacher as defined in section one, or an employee of any political subdivision of the commonwealth for which a system established under the provisions of such sections, or under corresponding provisions of earlier laws, is in operation on the date when he becomes an employee. . . ."



A teacher in the Boston School System hired after September 1, 1923 does not conform to the definition of a "teacher" included in section one, but is considered an employee of a political subdivision for which a pension system has been established. By virtue of the above statute, such an employee hired after age sixty is excluded from membership in the contributory pension system.

It has been suggested that Chapter 151 B of the General Laws conflicts with the above section of the Retirement Law. Section 4 of c. 151B reads, in part, as follows:

"It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, *age*, or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual *or to discriminate against such individual in compensation or in terms, conditions or privileges of employment*, unless based upon a bona fide occupational qualification." (Emphasis supplied.)

If the provision of the Retirement Law cited above is to be considered a discrimination by reason of age, a conflict arises with the Fair Employment Practices Law. In addition, § 9 of the said Fair Employment Practices Law states in part that ". . . provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provision thereof shall not apply. . . ."

I do not find that the above statutes are inconsistent, nor do I feel that the provisions of the Retirement Law must be subordinated to those of the Fair Practices Act. Employees hired after age sixty may claim that they are denied a privilege of employment (membership in the contributory pension system) by reason of age; but such membership is a privilege of employment granted by statute, and limited by such statute to individuals hired before the age of sixty. The distinction is a reasonable one made by the General Court, and cannot be said to be a discrimination of the type intended to be invalidated by c. 151 B.

Furthermore, paragraph one of § 4 of c. 151B is aimed at the elimination of discrimination by *employers*, and is not intended to be a blanket attack upon all distinctions validly in force by legislative enactment. An employer does not discriminate by following the law. If the employees in question were entitled under the statute to membership in the pension system, an employer clearly could not deny them the privilege by reason of their age. But where the statute itself excludes these people, no "privilege of employment" of which they can avail themselves exists, and an employer is not only entitled but is required to eliminate these particular employees from the retirement program.

Therefore, it is my considered opinion that the provisions of the Retirement Law control in this area, and that § 4 of c. 151B is inapplicable. Consequently, I advise that pursuant to § 3 of c. 32, employees of political subdivisions hired after age sixty are not to be eligible for the contributory retirement system.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The provisions of the contract of employment of its general manager by the Metropolitan Transit Authority entitling him to deferred compensation in the event of his removal at pleasure and not for cause, are valid and bind the authority.*

SEPT. 19, 1963.

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES:

GENTLEMEN: — I have received a copy of your Order of September 3, 1963 requesting the opinion of the Attorney General upon the following questions of law:

“1. May the trustees of the Metropolitan Transit Authority terminate the contract of employment of the general manager?

“2. If the trustees may terminate the contract of employment of the general manager, upon such termination must he be paid the full amount due him under the entire contract?”

The contract referred to is that entered into upon the first day of July, 1960 by the present general manager and the Metropolitan Transit Authority, acting through its Board of Trustees. This contract was revised by an agreement between the same parties executed May 11, 1962, effective January 1, 1962, which agreement contains provisions relative to deferred compensation and additional deferred compensation should the general manager be removed pursuant to the statutory authority of the trustees and not for cause.

Briefly, the contract recites the difficulties experienced by the trustees in finding an individual suitable for the position of general manager. Having determined that a substantial offer would have to be made in order to attract a qualified person and to justify his leaving a prior position with the resulting forfeiture of associated retirement rights, the trustees were prepared “to give as much assurance as the law would permit for the individual to retain the position of General Manager for a specified term”. By contracting for a specified period, the trustees also intended that the new general manager should be assured of a sufficient time in which to put his administrative skill to use.

Consequently, it was agreed that the general manager would serve the Metropolitan Transit Authority for a term of eleven years or until his retirement, subject, however, to removal at the pleasure of the Board of Trustees of the Authority, as provided for in § 4 of c. 544 of the Acts of 1947. The salary for the general manager was set at \$30,000 per annum for the first six months of the contract term, at \$35,000 per annum for the subsequent six months, and at \$40,000 per annum for the remainder of his term. (These figures were altered somewhat at a later time by the deferred compensation agreement mentioned above.)

In the event that the general manager should be discharged from office, not for cause, but pursuant to the power of the trustees to remove him at pleasure under the provision of § 4 of c. 544 of the Acts of 1947, the trustees contracted to pay, as liquidated damages, to the general manager, a sum equal to fifty per cent of the salary which would have been paid him had his period of employment run its full course. [The deferred compensation agreement effective January 1, 1962 provides also for additional deferred compensation in the event the general manager is removed pursuant to § 4 of c. 544, Acts of 1947.]

The general manager's duties and responsibilities were, it was agreed, those set forth in the Regulations of the Board of Trustees of the MTA. The contract also provided that no member of the Board of Trustees should be liable personally by reason of the Agreement, or as a result of its breach.

The employment contract with the general manager was entered into by the trustees pursuant to authority granted them by c. 544 of the Acts of 1947, which chapter established the Metropolitan Transit Authority. The enabling words appear in § 4, as amended:

"The Trustees may from time to time appoint and at pleasure remove a clerk, a treasurer, a general manager and such other officers, agents and employees of the Authority as they may deem necessary, and may determine their duties and their compensation, which shall be paid by the Authority . . . ."

Viewed as an ordinary business arrangement and without regard for the public policy questions which inevitably arise in connection with an employment contract executed by a public transit authority like the MTA, the contract described above is in my opinion a lawful agreement. The inclusion of liquidated damages in the event of removal without cause is not unusual and in the present case has a sufficiently close relation to the harm which would be done by removal so that the sum to be paid the general manager whose services have been terminated could not be invalidated as a penalty.

The trustees are authorized to appoint a general manager, to remove him "at pleasure", and to determine his compensation. A power to remove an employee at pleasure obviously differs from the power to remove an employee for cause. But whether an absolute power to remove an employee "at pleasure" is vested in the trustees or only a power which must be exercised with wise discretion is not clear. Examples of cases in which the Supreme Judicial Court has dealt with the meaning of the phrase "at pleasure" are as follows:

*Stebbins v. Police Com'rs. of Springfield*,  
196 Mass. 365

*McCann v. Commonwealth*, 213 Mass. 213

*Marrone v. City Manager of Worcester*,  
329 Mass. 378

The language of § 4 of c. 544, Acts of 1947 is susceptible of two interpretations. The trustees clearly have the power to remove the general manager at pleasure but they also have the undoubted authority to set his compensation, which *shall* be paid by the Authority. These powers are potentially contradictory, since by entering into a particular compensation agreement the trustees may defeat, or at least impair, their right to remove an employee at their pleasure. In the instant case it has been suggested that the trustees, by contracting to pay large liquidated damages to the present general manager should he be discharged at the trustees' pleasure, have limited their power of removal in that the incumbent general manager may now be removed only upon payment of a substantial amount of money.

The crucial question which you pose, therefore, is: did the General Court in enacting the statute which controls the functioning of the MTA

intend that the power vested in the trustees to remove the general manager at their pleasure, should remain completely untrammelled? Or may it be assumed that the Legislature recognized that the trustees might contract in such a way as to affect and limit their power of dismissal, and that such a result would not be inimical to the legislative intent?

In order to reconstruct the intent of the Legislature in passing a statute some sixteen years ago, consideration must be given to the situation and affairs which then, and now, are being regulated.

It is my opinion that in view of the need for continuity of management of the MTA, and the desirability of having a skilled individual in the position of general manager, an arrangement such as the one arrived at by the general manager and the trustees is a result reasonably anticipated by the Legislature, and is within the authority granted the trustees by § 4 of c. 544 of the Acts of 1947.

The Legislature must have been aware of the difficulty which is always encountered in attracting an eminently qualified individual to such a sensitive position. The members of the General Court must have realized that an arrangement would have to be made which would give any incumbent at least some security in the general manager's office. Our legislators must have assumed that no competent transportation expert would accept the position of general manager without adequate compensation.

I am not disturbed by the fact that the contract in question operates to bind future boards of trustees. The cases which hold that a public official may not bind his successors in regard to the former's appointees are clearly distinguishable, involving as they do, officials such as the Secretary of the Commonwealth and the Commissioner of Insurance. These public officials, by the nature of their offices, are entitled to employ agents and employees of their choice. They automatically hand over the same privilege to their successors.

*Cieri v. Commissioner of Insurance,*  
343 Mass. 181

*Howard v. State Board of Retirement,*  
325 Mass. 211

Such is clearly not the case with a public authority such as the MTA where continuity of management is essential. Here it is far less important that a particular board of trustees deal with a general manager who is their personal appointee.

Your second question relating to the compensation of the general manager should the trustees terminate his contract cannot be answered without reference to two separate factors. (1) Is the contract terminated for cause or (2) at the pleasure of the trustees as provided by the legislative enactment?

If the general manager's contract is terminated for cause, the Authority need pay him only for the service he has already rendered since the contracts involved provide for payment of additional compensation only in the event that his contract is terminated at the pleasure of the trustees.

If the general manager is removed at pleasure, however, and not for cause, I am of the opinion that the provisions of the contract cited as amended, must be followed. In such circumstances the general manager must receive the sum to which he is entitled under paragraph 3 of the revised agreement effective January 1, 1962. This would not be the full

amount due him under the contract as your question suggests, but would be fifty per cent of the amount which would have been paid had the contract been completed, including the additional deferred compensation provided for in the revised agreement effective January 1, 1962.

But should the general manager be removed by the trustees at their pleasure, there is a provision of paragraph 3 of the said revised agreement which I do find invalid. This provision recites, "For each month of (the general manager's) employment by the Authority (the general manager) shall be paid by the Authority six hundred twenty-five dollars (\$625.00)." Payment of the general manager's salary effective under the original contract entered into as of July 1, 1960 had been made for the first eighteen months' employment of the general manager by the Authority. Accordingly, the provision of paragraph 3 above recited, may only validly relate to the period affected by the revised contract commencing January 1, 1962.

We are concerned in the present matter with the integrity of contracts and the credit of the Commonwealth. As I have indicated, the legislative enactment (§ 4 c. 544, Acts of 1947) is somewhat vague. But in interpreting the contracts entered into by the trustees of the Metropolitan Transit Authority and its general manager, it is my considered opinion that the validity of said contract is well supported by long-range public policy arguments.

To your first question, I answer, "Yes".

If the trustees terminate the contract of employment of the MTA's general manager at their pleasure and not for cause, I also answer your second question in the affirmative with the proviso that the amount of liquidated damages to be paid the general manager as specified in paragraph 3 of the revised agreement effective January 1, 1962, should not include that portion of the contract I have herein held invalid.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The provision of St. 1916, c. 718 (Accelerated Highway Act) that the Commonwealth may reimburse a public utility for relocation costs authorizes the waiver of any provision of an occupancy permit issued to the utility putting the burden of the cost of relocation on the utility; and reimbursement thereunder is not in violation of contract. Clarification of wording of Occupancy Permit Forms, suggested. Public Utility reimbursement to, for relocation of facilities of, in connection with Acceleration State Highway Program; affect of Occupancy Permit Provision.*

SEPT. 23, 1963.

JACK P. RICCIARDI, *Commissioner, Department of Public Works*.

Re: *Reimbursement of Utility Relocation Costs*.

DEAR COMMISSIONER: — 1. By letter dated September 10, 1963 you have requested my further opinion on this subject in light of a memorandum of S. K. Booth, Deputy General Counsel, Federal Bureau of Public Roads, dated August 27, 1963, a copy of which you forwarded with said letter.

2. In that memorandum Mr. Booth indicated Federal acceptance of my opinion on this subject dated May 3, 1963 as, among other things, fulfilling the requirement of 23 U.S.C. 123 (a) that reimbursement of utility relocation costs be consonant with the law of the State involved to permit Federal-aid participation in such expenditures. He then draws attention to the fact that 23 U.S.C. 123 (a) imposes a further requirement that payments for utility relocation not violate a legal contract between the utility and the State.

3. Mr. Booth then quoted the following clause from the Occupancy Permit Form presently used by the Commonwealth of Massachusetts to grant to utilities permission to locate facilities in highway rights-of-way:

"The Department hereby reserves the right to order the change of location or the removal of any structure or structures authorized by this permit at any time, said change or removal to be made by and at the expense of the Grantee or its/their successors or assigns."

4. In his August 27, 1963 memorandum Mr. Booth advises that a Federal Bureau of Public Roads circular memorandum of September 17, 1958 considers such occupancy permits granted to public utilities as being within the meaning of the word, "contract" as used in 23 U.S.C. 123 (a).

5. Mr. Booth further advises that a prerequisite to Federal-aid participation in reimbursement of utility relocation costs is my opinion on whether such "contracts" including the clause quoted in the third paragraph hereof can be lawfully nullified.

6. Please be advised that I am not hereby accepting the interpretation of the word, "contract", included in the August 27, 1963 memorandum or the circular memorandum referred to in paragraph 4 hereof. That interpretation is not consistent with the law of this Commonwealth. However, resolution of the different interpretations of the word, "contract", is not necessary to providing my opinion on the questions raised in your letter of September 10, 1963.

7. Chapter 718, Acts of 1956, in paragraph 3 of Section 1 provides in part ". . . that the Commonwealth may reimburse the owner of such utility facilities for the 'Cost of Relocation' as such cost is defined in said act". (Federal Highway Act of 1956).

8. It is my opinion that the payment of utility relocation costs under the provisions of Chapter 718, Acts of 1956 as interpreted by Opinions of the Attorney General, dated May 3, 1963 and August 14, 1963 does not violate the clause quoted in paragraph 3 hereof of the Occupancy Permit Form presently used by your Department. In making any such payment the Commonwealth would be relinquishing a right it presently has. By enacting Chapter 718, Acts of 1956 the General Court granted to your Department the discretion to waive that right of the Commonwealth and to pay such utility relocation costs. However, the General Court did not thereby eliminate that right to require a utility permittee to pay relocation costs. Said Chapter 718 in no way alters the rights of the permittees. It is my further opinion that the General Court has the power and authority so to alter and amend the rights and privileges of the Commonwealth provided it does not thereby change or damage the contractual rights and privileges of another without consent. It is therefore my opinion that the General Court may "nullify"

the clause quoted in paragraph 3 hereof and that by enacting Chapter 718, Acts of 1956 it has delegated to your Department discretionary authority so to do. In connection with the exercise of that discretion your attention is respectfully invited to all of the provisions of my previous opinions on this subject of May 3 and August 14, 1963.

9. You also requested my opinion on whether your Department should defer processing permits of the type referred to herein pending re-wording of the present Occupancy Permit Form.

10. Paragraph 8 hereof makes it clear that it is my opinion that the Commonwealth is entitled to Federal-aid participation in payment of utility relocation costs as the Occupancy Permit Form is presently worded. It is therefore my further opinion that deferment of processing of additional permits of that type is not necessary pending re-wording of the present form.

11. To complete clarification of the issues set forth herein it is respectfully recommended that the clause of the present Occupancy Permit Form quoted in paragraph 3 hereof be amended to read as follows:

"The Department hereby reserves the right to order the change of location or the removal of any structure or structures authorized by this permit at any time, said change or removal to be made by and at the expense of the Grantee or its/their successors or assigns; provided, however, that the Department may in its discretion reimburse the Grantee or its/their successors or assigns for the 'Cost of Relocation' as such cost is defined in the Federal Highway Act of 1956, enacted by Congress as Public Law 1627, as amended."

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The State Department of Public Works has discretion to decide what portion of the State Highway System should be cleared of snow and ice.*

SEPT. 24, 1963.

HONORABLE WARREN A. TURNER, *Sixth Berkshire District, House of Representatives*.

Re: *Plowing of State Highway Within Town of Windsor.*

DEAR REPRESENTATIVE TURNER: — A thorough investigation of the problems set forth in your letter of September 3, 1963 on this subject has been completed.

It appears that there is a portion of what was formerly Route 9 within the Town of Windsor which continues to be a State Highway although a by-pass has been constructed which has resulted in the discontinuance of the use of the roadway as a part of Route 9. As you note, there are approximately twenty homes on that segment of that State Highway.

This Department has been advised that the Department of Public Works would prefer to abandon the segment of highway in question. However, it may not do so under the provisions of Section 12 of Chapter

81 of the General Laws unless it obtains concurrence of the County Commissioners. That concurrence has not been forthcoming.

The General Laws quite clearly impose upon the Department of Public Works the duty of maintaining the State highways. However, that duty does not appear to be controlling in this situation. Your attention is respectfully invited to Section 19 of Chapter 81 of the General Laws which states:

"The Commonwealth shall keep such Highways or parts thereof as *it may select* sufficiently clear of snow and ice."

The emphasis of underlining has been inserted by me to indicate that there is no statutory mandate requiring the removal of snow and ice from State highways by the Department of Public Works. As a matter of fact I am informed that there are many State highways or portions thereof which the Department of Public Works does not plow.

It is my opinion that in view of the language of Section 19 of Chapter 81 of the General Laws of the Commonwealth the Department of Public Works has the discretion to decide what portions of the State Highway System it shall plow.

Careful research has disclosed no legal prohibition against the plowing of a segment of a State highway by a town.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A proposal specification for State Highway contracts recognizing that natural materials specified are often not exact uniformity and quality, making the engineer the sole judge of reasonable conformance and acceptability and for price adjustments and other determinations, could not, in view of G.L. c. 29, § 8A, requiring competitive bidding in contracts for public works, permit renegotiation or substantial changes in the contract, but would authorize changes within reasonable limits. G.L. c. 30, § 391, does not permit renegotiation of contracts nor substantial changes therein and is not inconsistent with prior Attorney General's opinions that such action is not permissible without competitive bidding.*

SEPT. 25, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works.*

DEAR SIR: — In your letter of August 26, 1963, you quote a draft of a proposed AASHO Guide Specification for Highway Construction which is as follows:

"It is the intent that all materials to be incorporated in the work and all construction work produced will be in conformity with the plans and specifications. It is recognized, however, that most natural materials specified for use in highway construction are of a class that precludes exact uniformity as to quality or physical characteristics. When such a condition is found to exist the engineer shall be the sole judge as to whether such materials or the finished products in which such materials



are used are in reasonable conformance with the contract and are acceptable.

"If tests show that the specification values are not being reasonably met, determination will be made by the engineer of the cause(s) for such situation. If determination is made that the cause is beyond the reasonable control of the contractor, appropriate changes in the contract specifications may be ordered by the engineer and an equitable adjustment made, if necessary, in the contract prices and the time for performance.

"In the event the engineer finds the materials, or the finished product in which the materials are used, not within reasonable conformance with the plans and specifications, he shall then make a determination if the work shall be accepted and remain in place, and, if so, the amount to be paid for such work, or if the work shall be removed and replaced or otherwise corrected in a satisfactory manner by and at the expense of the contractor."

You inquire whether the proposed specification if incorporated into your department contract specifications would be permissible under existing law.

I have examined the proposed specification and from its wording I would say that it is similar and would have the same effect as many articles now contained in your Standard Specifications, namely Articles 20, 21, 22, 23, 28, et seq.

General Laws c. 29, § 8A requires that public works contracts of one thousand dollars or over be awarded on the basis of free competitive bidding. In the *Morse*, case, 253 Mass. 247, 252, 253, it was said that:

"Statutes must be interpreted, if reasonably possible, so as to effectuate the purpose of the framers."

And it further said:

"The terms and purpose of the governing statutes constitute in themselves a restriction of the power to amend and alter a contract once made in accordance therewith. It cannot be changed in vital and essential particulars without observance of all the formalities prescribed by the statutes."

The Court in the same case made the following observations:

"The city officers have authority doubtless to add to or change the contract within reasonable limits in order to remedy incidental defects and to improve the work in minor details."

If it is the intent of the proposed specification to provide for changes of the contract or extra work within reasonable limits, then said specification is permissible. If, on the other hand, it should be interpreted to provide for the renegotiation so that in effect it is a substantial change of the original contract, then the specification would be objectionable to this department.

You also ask whether or not § 39 I of c. 30 of the General Laws, in effect, is inconsistent with two prior opinions of my predecessor; namely, of November 21, 1961 and August 9, 1961, which concern essentially the same subject matter.

The reference to deviations of a contract in that section is not a grant of power, but is, in itself, a limitation as to the form in which alone it can be accomplished where otherwise permissible and authorized under the contract provisions and the Standard Specifications.

In my opinion the purpose and intent of § 39 I is not authority for renegotiation of contracts nor permissive legislation for substantial changes of a contract.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*Permits for the non-military use of an armory or air installation require unanimous approval of the adjutant general and the military custodian and Unit Commander concerned, and permission may be conditional.*

SEPT. 30, 1963.

COL. RALPH T. NOONAN, *Mass. ARNG State Quartermaster*

DEAR SIR: — I have your letter of July 8, 1963, requesting my opinion relative to an interpretation of Mass. G.L. c. 33, § 122. Paragraph (b) designates the approach to be taken by state military officials to applications for non-military uses of armories and air installations.

“(b) Any armory or air installation may be used for the purposes set forth in subsections (c) and (e) in accordance with terms and conditions prescribed by the commander-in-chief, upon application therefor to the adjutant general through the military custodian of the armory or air installation. No such application shall be granted unless it is approved by the military custodian and the adjutant general and contains a certificate from each unit commander whose drill or other military duty is to be changed or modified by such use, stating that he approves the application and that such change or modification will not in any way be detrimental to his unit or to its training, and further stating in detail the manner in which said change or modification is to be effected. Such applications may, after the lapse of one year from the date of their receipt, be destroyed or disposed of by order of their lawful custodian, and any proceeds received in the course of their disposal shall be paid to the commonwealth.”

Pursuant to this section, applications must be addressed to the adjutant general, and sent to the adjutant general through the military custodian. For permission to be validly granted, three parties must concur on the decision; the application must be approved by the adjutant general and by the military custodian, and must contain appropriate certificates from unit commanders affected. No use may be authorized unless such certificates are issued by each unit commander whose unit is affected by the desired non-military use indicating that such effects will not be harmful to the unit or to its training.

Decisions of the three parties involved (adjutant general, military custodian and unit commander) are to be made independently, and no decision of one officer is to be overruled by another. The military custodian may, for example, approve the use of the armory, yet final per-

mission would not be granted if a unit commander determines that the proposed use may be harmful to his unit.

The statute is clear that an application must be approved by all of the three parties mentioned above for permission to issue. Since under the law applications are directed to the adjutant general, presumably permission to use the particular facility issues from his office. However, this in no way indicates that concurrence by the military custodian and unit commanders is not necessary, or that the adjutant general may overrule decisions made by those officers. The adjutant general may delegate to the State Quartermaster or to the other officials ministerial functions connected with the issuance of a permit, but, of course, cannot delegate the making of the determination whether or not the application is to be approved.

I direct your attention to paragraph (c) of the section, which provides as follows:

*"Subject to subsection (b) an armory or air installation may be used for:*

*"(2) For a period not exceeding three days for any exhibition of the products of labor, agriculture or industry, including any automobile exhibition conducted by a responsible organization, . . ."* (Emphasis supplied.)

If permission is granted for a use specified in this paragraph, the adjutant general or military custodian may properly limit the type of products to be exhibited. Even when all conditions are satisfactorily met, permission to use the armory or installation is not mandatory, and the officers in charge may well insist that certain conditions be met before approving an application. In addition, paragraph (b) permits the use of the facilities "in accordance with terms and conditions prescribed by the commander-in-chief".

I would add a note relative to the responsibilities of the State Quartermaster in this area. The State Quartermaster has charge of all State military buildings.

"There shall be one full-time state quartermaster who shall, except as otherwise provided in this chapter and in chapter three hundred and forty-four of the acts of nineteen hundred and thirty-six, have the care and control of all land and buildings held for military purposes and all other military property of the commonwealth except such as is by law expressly intrusted to the keeping of others. . . ." G.L. c. 33, § 15 (d). (See also G.L. c. 33, § 125.)

However, care and maintenance of military land and buildings does not extend to control of the issuance of permits for non-military use. By the statutes discussed above, such determinations are to be made by the military custodian, adjutant general and appropriate unit commander. Related clerical work may, of course, be done by the office of the State Quartermaster, and ministerial functions relative to the granting of permits may be delegated thereto. But control of the use of installations under § 122 of c. 33 remains vested in those individuals specified by the statute.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A railroad company reducing commuter service in operation, or discharging employees in service on January 1, 1961 in violation of St. 1961, c. 464 forfeits the tax exemption for balance of the three years fixed in the act after the violation.*

Oct. 1, 1963.

NORMAN MASON, *Chairman, Department of Public Utilities.*

DEAR SIR: — You have requested an opinion relative to the statutory rights of railroad companies in Massachusetts to tax exemptions provided for by Chapter 464 of the Acts of 1961. You have asked the following questions:

- "1. If a railroad has in fact reduced commuter service on or after January 1, 1961, the effective date of this Act, is said railroad entitled to a tax exemption in any one of the following three calendar years?
- "2. If a railroad has discharged, suspended or laid off any person employed on or after January 1, 1961, and within the next three calendar years, as provided in Sec. 12D of said Act, is said railroad entitled to a tax exemption in any one of the three calendar years as prescribed by the Act?"

Chapter 464 of the Acts of 1961 provides for certain exemptions from real estate taxes assessed upon land classified as devoted to railroad use. Railroad companies are made eligible for such exemptions under said c. 464 for the years 1961, 1962 and 1963.

"Section 12C. No railroad corporation receiving a tax exemption under this act shall reduce any commuter service provided on the effective date thereof. Any railroad corporation violating the provisions of this section shall forfeit the tax exemption provided by this act.

"Section 12D. No railroad corporation receiving a tax exemption under this act shall discharge, suspend or lay off any person employed on the effective date thereof except for just cause and with the consent of a justice of the superior court after a hearing. Any railroad corporation violating the provisions of this section shall forfeit the tax exemption provided by this act.

"Section 13. This act shall take effect as of January first, nineteen hundred and sixty-one."

In order for the railroad corporation to be eligible for the tax exemptions granted by the statute, commuter service in the Commonwealth may not be reduced from the level maintained by the railroad on January 1, 1961, the effective date of the Act. Likewise, no person employed by the railroad in Massachusetts on or before said effective date of the Act may be discharged, suspended or laid off except in conformance with the statutory requirements — i.e., for just cause and with consent of a Justice of the Superior Court given after a hearing. Should these provisions be violated at any time during the three-year period, the railroad corporation taking such action forfeits its rights to the specified tax exemptions for the remainder of the statutory term.

With reference to § 12D, it should be mentioned that the restrictions upon removal of employees apply only to employees engaged by the company on or before January 1, 1961, the effective date of the statute. Workers hired after that date apparently may be discharged without fol-

lowing the pattern required by § 12D, and without loss of the tax exemptions provided. In addition, violations of §§ 12C and 12D will result in loss of the tax exemptions for the entire three-year period only if such violations occur in 1961. Violations occurring in subsequent years result in forfeiture solely of those exemptions still to be enjoyed, and in no way affect tax payments already made or tax privileges already realized.

Therefore, in answer to the questions you have posed, a railroad corporation which reduces commuter service in Massachusetts below the level maintained on January 1, 1961, or which discharges, suspends or lays off an employee employed by the company for work in this Commonwealth on January 1, 1961 without conforming to the requirements specified in the above-mentioned § 12, shall forfeit the tax exemptions provided by c. 464 of the Acts of 1961, such forfeiture to apply to the period from the date of the violation to December 31, 1963, the conclusion of the term covered by the statute.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Interview given by Advisory Board of Pardons to a prisoner constituted a hearing under G.L., c. 127, § 154. There is no requirement that copies of transcripts of hearings be delivered to prosecuting officials.*

OCT. 4, 1963.

HON. JOHN J. DRONEY, *District Attorney for Middlesex County*.

DEAR MR. DRONEY: — I have received your letter of October 1, 1963 relative to hearings before the Advisory Board of Pardons. You have presented the following questions for consideration:

- 1) Does the interview given John Joseph Kerrigan by the Advisory Board of Pardons on July 19, 1963 constitute a "hearing" under par. 4 of § 2 of c. 467 of the Acts of 1961?
- 2) Are the Attorney General and the District Attorney involved in the particular matter entitled to a copy of the transcript of such interview or hearing?

These matters are controlled by Mass. G.L., c. 127, § 154, as recently rewritten by St. 1961, c. 467, relevant parts of which read as follows:

*"Within ten weeks of the original receipt of any (pardon) petition, the advisory board shall transmit the original petition to the governor, together with its conclusions and recommendations and together with such recommendations as have been received from the above officials; except that if the board shall determine that adequate consideration of the case requires a hearing on its merits by the board, said board shall not be required to submit its recommendations at the end of ten weeks but shall notify the governor of its intention to hold a hearing; but such hearing shall be held and a report made to the governor within six months of the original receipt of the petition by the board. If the board shall determine that such hearing shall be held, in the case of a petitioner who is confined under sentence for a felony, the attorney general and the district attorney shall be notified of the hearing and they or their representa-*

*tives given the opportunity to appear, examine the petitioner's witnesses and be heard.*

"... in all cases a statement containing the facts of the crime or crimes for which a pardon or commutation is sought, the sentence or sentences received, together with all conclusions and recommendations shall be made public when the report is submitted." (Emphasis supplied.)

I agree that the interview given the defendant John Joseph Kerrigan on July 19, 1963 was a "hearing" held pursuant to paragraph 4 of the statute. Consequently, since the petitioner Kerrigan was confined under sentence for a felony, both the Attorney General and the District Attorney should have been informed that such an interview or hearing was scheduled to take place. Likewise, the Attorney General and District Attorney should have been permitted — if such were their desire — to appear at the hearing and to examine witnesses.

However, in my opinion the statute does not require that copies of the transcript of such a hearing be turned over upon request to these offices. The controlling section provides only that there be sent to the Governor the original pardon petition, conclusions and recommendations of the Advisory Board and any recommendations which may have been submitted by the officials specified in a prior clause of the statute. The only other relevant requirement is that there must be made public at the time the report to the Governor is filed a statement containing facts of the crime, sentence received and all conclusions and recommendations. Nothing further having been provided, it must be assumed that the General Court did not intend that the Advisory Board be required to turn over any other documents (including copies of transcripts) to any public official.

Therefore, it is my opinion that the interview granted John Joseph Kerrigan by the Advisory Board of Pardons did constitute a hearing under par. 4 of the statute. However, the fact that the Attorney General and District Attorney may by right appear at such a hearing does not in and of itself entitle them to copies of the transcript.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The Massachusetts Rehabilitation Commission has authority to enter into contracts for consultant services.*

OCT. 10, 1963.

HON. FRANCIS A. HARDING, *Commissioner of Rehabilitation, Massachusetts Rehabilitation Commission.*

DEAR COMMISSIONER HARDING: — This is to acknowledge receipt of your letter of September 26, 1963, together with a photostatic copy of a contract signed by the Massachusetts Rehabilitation Commission and Hollis M. Leverett Associates, Inc., for consultant services which began on July 1, 1963.

You also state that this contract was approved as to form by this office and that you have had similar contracts for similar services which also have been approved by this department and which have been approved

for payment from federal funds as well as the comptroller of the Commonwealth.

You inquire whether or not this contract is binding upon the Commonwealth in its present form. The pertinent provision of the General Laws on this subject is contained in c. 6, § 75, and reads, in part, as follows: "He (commissioner) may establish such divisions and with the approval of the Governor and Council may appoint such directors as he deems necessary and such assistants and consultants as may from time to time be necessary to enable him to perform his duties." See also St. 1956, c. 602, § 2.

I have examined the contract that you have submitted and from the above referred to § 75, it is my opinion that your department has the authority to enter into this type of contract, that the contract is in proper form and binding upon the Commonwealth, and that the Commonwealth is obligated for payment under said contract upon proper evidence of performance on the part of the consultant.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Directorships of community colleges are within the exemption under St. 1963, c. 500 (General Appropriation Act) from the in s. 61 of said Act, against recruitment (at a rate above the minimum of persons who have been in the service of the Commonwealth.*

OCT. 11, 1963.

KERMIT C. MORRISSEY, *Chairman, Massachusetts Board of Regional Community Colleges.*

DEAR MR. MORRISSEY: — Your letter of October 7, 1963 to the Attorney General relative to the appointment of directors for community colleges has been received. You have asked whether the Board of Regional Community Colleges may lawfully appoint individuals as directors of colleges at rates above the minimum despite the fact that such candidates have been employed by the Commonwealth during the past year.

Section 6A of c. 500 of the Acts of 1963 generally prohibits the hiring of persons above minimum rates when such persons have worked in the service of the Commonwealth during the year prior to appointment.

"Notwithstanding the provisions of paragraph (5A) of section forty-six of chapter thirty of the General Laws, the director of personnel and standardization shall not approve the recruitment of any person at a rate above the minimum of the grade if such proposed employee has been in the service of the commonwealth within a twelve-month period prior to the date of the proposed recruitment. . . ."

However, certain positions have been exempted from this restriction by the General Court.

". . . the provisions of this section shall not apply to positions essential for the care of patients or inmates in institutions or to positions essential for the educational program of the department of education including the University of Massachusetts, the Lowell Technological Institute and the regional community colleges. . . ."

In view of the clause cited above, it is my opinion that the Legislature clearly intended that the regional community colleges need not be bound by the restrictions of § 6A upon pay rates, and that the individuals currently being considered for appointment to college directorships may be hired at rates above the minimum.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Massachusetts Port Authority must pay the full amount of the retirement benefits on account of accidental death or disability to employees formerly in the service of the Mystic Bridge Authority.*

OCT. 17, 1963.

HON. JOHN T. DRISCOLL, *Treasurer and Receiver-General, Chairman, State Board of Retirement.*

DEAR SIR: — I have your request relative to the share of the Massachusetts Port Authority on retirement allowances to employees of the Authority who had been previously employed by the Mystic River Bridge Authority. This reply has been delayed in coming to you since it was the understanding of this Department that the question you raised had been resolved as the result of informal conferences with the Executive Secretary of your Board.

You recite in your letter that the answers to questions 1 and 2 raised therein are clear, inasmuch as my predecessor in this office in his opinion of June 21, 1962 resolved these issues, and I concur in said opinion of my predecessor. Accordingly, I have directed my reply to the third question you raise only.

You ask in question 3 whether benefits paid to employees or their dependents under the provisions of §§ 7 or 9 of c. 32 are to be borne "in toto" by the Commonwealth, or whether they are to be borne "in toto" by the Massachusetts Port Authority, or whether the benefits are to be measured on the basis of the period of service of the employee with each entity.

Disability and accidental death benefits are not paid because of length of service. They are based upon the premise that the disability claimed was incurred as the natural and proximate result of an injury sustained while the claimant is in the performance of his duties at some definite time or place. The length of service is not a prerequisite to making one eligible for these particular benefits, even though the amount of the benefit is determined by the annual rate of regular compensation on the date such injury was sustained. With reference to *Opinion of the Justices*, 334 Mass. 721, 740, cited in the Attorney General's opinion of June 21, 1962, the Court said in answer to the question, "May the Commonwealth constitutionally undertake to pay retirement allowances of retired employees of the (Massachusetts Port) Authority subject to being reimbursed by the Authority as provided in § 22 of the bill?":

"Since the Authority should be a public corporation we see no reason why the Commonwealth cannot undertake these payments which would be for a public purpose and should be reimbursed to the Commonwealth."



Chapter 465 of the Acts of 1956, which created the Massachusetts Port Authority, specifically states that the Authority shall reimburse the Commonwealth for its proportionate share of any amounts expended by the Commonwealth under the provisions of c. 32 for retirement allowances to or on account of employees. This section obviously refers only to superannuation retirement and is specifically silent as to benefits under §§ 7 or 9, as they apply to the state retirement system.

It is my opinion, therefore, that in the case of accidental death retirement benefits or disability benefits, said benefits are not to be prorated and are to be paid in full by the agency in whose employ the claimant is at the time of such accidental or disability retirement.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The inclusion in contracts of the Department of Public Works, of the prohibition against the restriction of assignment of accounts receivable contained in s. 9-314 (f) of the U.C.C. shall be of no force or effect.*

OCT. 22, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works*.

DEAR SIR: — In your letter of October 21, 1963 you have requested an opinion relative to the power of a contractor to assign accounts receivable despite the prohibition contained in Article 65 of the Mass. Standard Specifications for Highways and Bridges (1953).

Traditionally, this Article, which prohibits the assignment of monies due from the Commonwealth without the latter's consent, has been included in construction contracts entered into by the Department of Public Works.

*"Article 65. Prosecution and Progress.* The contractor shall give his personal attention constantly to the faithful prosecution of the work, shall keep the same under his personal control, and shall not assign by power of attorney, or otherwise, or sublet the work, or any part thereof without the previous written consent of the Party of the First Part and shall not, either legally or equitably, assign any of the moneys payable under this agreement, or his claim thereto, unless by and with the like consent of the Party of the First Part. He shall be responsible for the acts and omissions of his subcontractors, if any, and of all persons directly or indirectly employed by him or them in connection with the work."

Such an assignment of accounts receivable is under the Massachusetts Standard Specifications considered to be a breach of the construction contract and grounds for annulment.

*"Article 76. Annulment of Contract.* If the Contractor shall be adjudged a bankrupt, or if he shall make a general assignment for the benefit of his creditors . . . or if the contract or any claim thereunder shall be assigned by the Contractor otherwise than as herein specified, or if the Engineer shall be of the opinion, and shall so certify in writing to the Party of the First Part . . . that the Contractor has violated any of the provisions of

the contract, the Party of the First Part may notify the Contractor to discontinue all work, or any part thereof. . . ."

Prior to 1958, such provisions could validly be incorporated into construction contracts, whether such contracts had been granted by the Commonwealth or by a private individual or corporation. With the passage of the Uniform Commercial Code, however, the power of an account debtor to insist upon the non-assignability of accounts receivable was affected. Massachusetts G.L., c. 106, § 9-318 (4) provides:

"A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective."

Although the Supreme Judicial Court has yet to render a decision expressly interpreting the UCC section at issue, the Court has indicated parenthetically in cases decided under the old law that determinations under the UCC would uphold the right to assign accounts receivable.

*McLaughlin v. N. E. Tel. & Tel. Co.*,  
188 N.E. 2d 552 (1963)

*Security National Bank v. G. M. Corp.*,  
187 N.E. 2d 820 (1963)

However, these cases involved private account debtors only, shedding no light upon the effect of the statute should the Commonwealth be the party granting the contract. Consequently, it must be determined whether § 9-318 (4) of the Uniform Commercial Code applies to the Commonwealth so as to enable a contractor to assign accounts receivable despite the specifications incorporated into the contract.

Since the Commonwealth is not specifically referred to in § 9-318 (4), it is not clear on the face of the statute whether or not the Commonwealth was intended to be affected. But this problem is settled by the Definitions sections of the Uniform Commercial Code, which clearly indicate that the Commonwealth is bound by the provision. "Account debtor", the term used in § 9-318 (4), is defined by § 9-105 (a) as "the person who is obligated on an account, chattel paper, contract right or general intangible". The word "person" includes an individual or an organization. Referring then to § 1-201 (28):

"'Organization' includes a corporation, government or governmental subdivision or agency. . . ."

It follows that since "account debtor" includes the government or a governmental agency the new prohibition against restriction of the assignment of accounts receivable must be taken to apply to the Commonwealth as well as to any private account debtor.

It has been suggested that despite the illegality of a provision prohibiting assignment of accounts such an agreement remains effective as to the contracting parties and that violation would constitute breach of contract. This manifestly is what the statute is designed to avoid. Had the statute been worded in such a way as to indicate merely that account receivable financing was lawful, then conceivably the parties could contract as they pleased, permitting such financing or not as they desired. But the statute is not so phrased; rather, it contains a clear mandate that prohibition of such financing shall be unlawful. This being the case, the parties have no power to contract in violation of the statutory provision, and any attempt to do so would be void.

Even apart from the Definitions sections of the UCC, it should be concluded that the Commonwealth was intended to be affected by § 9-318 (4). The general purpose of the USS is to adjust the laws governing commerce to the practical facts of business life. Over the past generation, financing by use of accounts receivable as security has become an important part of commercial practice. The fact that the Commonwealth is the account debtor does not mitigate the importance to the potential assignor of the capacity to use the accounts due as security. A statute that regulates particular commercial transactions, in which transactions the Commonwealth frequently takes part, should not be construed to be inapplicable to the Commonwealth without some clear indication that such was the legislative intention.

It is my opinion that an interpretation which exempted contracts of the Commonwealth from the provision at issue would be a serious defeat of the intentions of the drafters of the UCC. Therefore, I advise that the prohibition against restriction of assignment of accounts receivable contained in § 9-318 (4) applies to the Commonwealth, and that the inclusion in contracts of such restrictions shall be of no force or effect.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Department of Public Works can order the owner of the fee in property described in deeds of easement to uncover drainage outlets constructed as a result of the grouting of that easement to insure proper operation of the drainage system in regards to state highways.*

OCT. 28, 1963.

COMMISSIONER JACK P. RICCIARDI, *Department of Public Works*.

Re: State Highway Route 1A — Drainage on Enon Street, Beverly.

DEAR COMMISSIONER RICCIARDI: — On August 21, 1963 you advised me that flooding has been noted on State Highway Route 1A in Beverly because a drainage outlet has been covered and a parking area for a restaurant has been constructed over it. In response to the request of this Department dated September 6, 1963 a copy of the applicable Deed of Easement was forwarded to this department by letter of October 15, 1963.

You have requested my opinion on whether the Department of Public Works can order the present owner of the property on which the drainage outlet is located to uncover that outlet to insure proper operation of State Highway drainage systems.

The pertinent sections of the General Laws are:

*Chapter 83 Section 4.* "The Department of Public Works . . . may construct ditches or drains for the purpose of properly draining any highway, and may carry away from any highway and over and through any land as they may deem necessary for public convenience or for the proper care or construction of such highway and may purchase or take by eminent domain, under Chapter seventy-nine, on behalf of the Commonwealth . . . such land or interest therein as may be necessary therefor.

"Such ditches and drains shall be under the control of said officials, who may enter upon any land for the purpose of constructing, repairing, or maintaining the same. . . ."

*Chapter 83 Section 9.* "Whoever by himself, his agent, or servants, deposits in or along any ditch or drain constructed under Section four any material which will obstruct the flow of water therein shall be punished by a fine of ten (\$10.00) dollars, and shall be liable in tort to the Commonwealth . . . for all damages caused thereby, for the cost and expense of removing the obstructing material and of restoring the ditch or drain to its former condition."

The Deed of Easement, given to the Commonwealth by predecessors in title of the present owners of the property involved, was properly signed, acknowledged and recorded in the Essex County Registry of Deeds for the Southern District in Book 2920, Page 319 on July 2, 1932. That instrument gave the Commonwealth a perpetual easement to "construct a drain . . . and to discharge water from said drainage system upon the said land, to carry water away from said highway and over and through our land . . . and to enter upon our land at any time for the purpose of constructing, repairing, and maintaining said drainage system, drain and an outlet thereof under Section four of Chapter 83 as shown on plan dated May 19, 1932, drawn by A. W. Dean . . . and recorded herewith."

Section 4 of Chapter 83 states, "the Department . . . who have taken an easement under this section may discontinue or abandon the same by filing for record in the Registry of Deeds a suitable instrument."

It is my understanding that the Department of Public Works has not discontinued or abandoned the said easement.

It is my opinion that the Department of Public Works can order the present owner of the fee in the property described in the Deed of Easement referred to herein to uncover the drainage outlet constructed as a result of the granting of that easement to insure proper operation of the drainage system of the State Highway.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The Metropolitan District Commission may properly convey land in exchange for land of equal value pursuant to G.L., c. 92, § 85 which permits the sale of land or interest therein acquired for park or boulevard purposes.*

OCT. 31, 1963.

HON. JOHN F. HAGGERTY, *Acting Commissioner, Metropolitan District Commission.*

DEAR SIR: — I have received your letter of October 9, 1963 relative to the power of the Metropolitan District Commission to convey land acquired for park or boulevard purposes. You have asked whether section 85 of Chapter 92 of the General Laws authorizes the Commission to convey such lands in exchange for lands of equal value.

Mass. G.L., c. 92, § 85 permits the sale of land or interests therein acquired for park or boulevard purposes, and reads in part as follows:

"The commission, with the concurrence of the park commissioners, if any, in the town where the property is situated, may sell at public or private sale any portion of the lands or rights in land the title to which has been taken or received or acquired and paid for by it for the purposes set forth in sections thirty-three and thirty-five, and may, with the concurrence of such park commissioners, execute a deed thereof, with or without covenants of title and warranty, all in the name and behalf of the commonwealth, to the purchaser, his heirs and assigns, and deposit said deed with the state treasurer, together with a certificate of the terms of sale and price paid or agreed to be paid at said sale, and, upon receipt of said price and upon the terms agreed in said deed, he shall deliver the deed to said purchaser. . . ."

Clearly, authority is vested in the Metropolitan District Commission to sell lands that qualify under the section, assuming that all requirements are met. The question arises, however, whether or not the granting of power to sell necessarily implies that the Commission shall also have the right to exchange lands for lands of equal value.

Although the word "sell" frequently connotes the transfer of a particular property for cash, its meaning may expand according to context. A sale necessitates consideration, which consideration need not be cash but may be goods or other property. Land of equal value would without doubt be valid consideration for the transfer of other land.

It is apparent that the statute regulating these particular transactions by the Metropolitan District Commission should not be construed so narrowly as to limit transfers of land to those in which cash is the sole consideration. The purpose of c. 92, § 85 is to give the Commission power to convey certain real property. The factor that is of consequence is that the Commission may properly divest itself of land; what the consideration may be, be it cash or land of equal value, is — in my opinion — of no importance.

I am aware of the fact that c. 92, § 83, which section authorizes the Commission to convey lands not needed for water systems, specifically includes the power to "exchange", whereas c. 92, § 85 does not. However, the present c. 92 is a collection of prior statutes taken from a variety of areas, and it is likely that perfect adjustments in language were not made. Since practicality dictates otherwise, I feel that the absence of the word "exchange" in § 85 should not defeat what is apparently the intention of the General Court.

Therefore, assuming that the requirements of the section relative to the type of land which may be conveyed are met, and that the necessary approval by the Park Commissioners or by the Governor and Council is obtained, it is my opinion that the Metropolitan District Commission may properly convey land in exchange for land of equal value pursuant to the provisions of c. 92, § 85.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The Department of Natural Resources is not affected by the language of budget item 8064-03 of the 1963 Capital Outlay Act in regards to the Department's municipal reimbursement program administered under c. 132A, § 11 and consequently the department may properly continue expenditures under its 1962 program, and continue the 1963 program.*

Nov. 8, 1964.

HON. CHARLES H. W. FOSTER, *Commissioner of Natural Resources.*

DEAR MR. FOSTER: — I have received your letter of October 9, 1963 relative to the municipal reimbursement program administered by the Department of Natural Resources pursuant to Mass. G.L., c. 132A, § 11 (as amended). You have asked whether the Department may properly continue its program of financial aid to cities and towns in light of the wording of budget item 8064-03 of c. 648 of the Acts of 1963, the Capital Outlay Act.

Massachusetts G.L., c. 132A, § 3 (as amended) provides in part as follows:

"The commissioner may, from time to time within the limits of appropriations made therefor, acquire for the commonwealth . . . any lands suitable for purposes of conservation or recreation lying outside of the metropolitan parks district, and may lay out and maintain such lands for such purposes and erect and maintain such structures and other facilities thereon as may be necessary to render such lands reasonably available and accessible therefor. . . ."

Funds appropriated for the purposes set forth in § 3 may be used in order partially to reimburse cities and towns for conservation and recreation expenditures.

"The commissioner shall establish a program to assist the cities and towns . . . in acquiring lands and in planning or designing suitable public outdoor facilities. . . . He may, from funds appropriated to carry out the provisions of section three, reimburse any such city or town for any money expended by it in establishing an approved project under said program in such amount as he shall determine to be equitable in consideration of anticipated benefits from such project, but in no event shall the amount of such reimbursement exceed fifty per cent of the cost of such project. . . ."

Mass. G.L., c. 132A, § 11 (as amended).

Budget item 8063-02 of c. 705 of the Acts of 1962 provided the sum of \$500,000 for the purposes of § 3 of c. 132A, a part of which has been used by the Department for reimbursement of cities and towns under § 11. However, the 1963 appropriation provision is couched in language that is somewhat different from that used in 1962. \$1,000,000 is appropriated:

"For the development and improvement of recreational facilities on land owned or controlled by the department, as authorized by section three of chapter one hundred and thirty-two A of the General Laws. . . ."

St. 1963, c. 648, § 2, par. 8064-03.

The question has arisen whether or not the inclusion of the phrase "on land owned or controlled by the department" indicates that the General

Court intended that no further funds be employed for reimbursement of cities and towns.

Despite the fact that the appropriation for purposes of § 3 is specifically directed for use on lands owned or controlled by the Department of Natural Resources, and not for lands belonging to cities and towns, it is my opinion that funds may still be used for reimbursement under § 11. Money used for such reimbursement comes, as set forth in § 11, "from funds appropriated to carry out the provisions of section three". Consequently, unless otherwise provided, allotments for cities and towns may be made by the Commissioner as provided in § 11 of c. 132A, irrespective of the language used in legislative appropriations enacted under the authority of § 3.

It is apparent that the phrase "on land owned or controlled by the department" used in the appropriation section was meant by the General Court to apply only to expenditures for the purposes of § 3, and was not intended in any way to affect reimbursement procedures carried on under § 11. Had the Legislature wished to discontinue the practice of reimbursement of municipalities, it is to be expected that it would have spoken in definite terms either by amending § 11 of c. 132A in some way or by expressly stating in the appropriation provision that the funds therein provided were not to be earmarked for municipal use.

In the absence of such express indication that the prior practice of reimbursement of cities and towns is to be discontinued, I am of the opinion that the language of budget item 8064-03 of the 1963 Capital Outlay Act does not affect the Department's municipal reimbursement program administered under c. 132A, § 11. Consequently, the Department may properly continue expenditures begun under its 1962 program, and may administer a 1963 program using this year's appropriation.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Application of St. 1963, c. 336, (as to grants of authority to blind persons for vending stands or public property), to proposals limited by the Department of Corporations & Taxation for automatic vending machines and mobile food carts, stated*

Nov. 18, 1963.

HON. LEO E. DIEHL, *Commissioner of Corporations and Taxation*.

DEAR COMMISSIONER DIEHL: — I have received your letter of October 31, 1963 relative to the effect of St. 1962, c. 336 upon proposals submitted for the privilege of operating vending machines and mobile food carts upon the premises of the Department of Corporations and Taxation. You have requested responses to the following questions:

- "1. Is the proposal submitted by the Division of the Blind on behalf of a person to be selected by it a valid and proper one and entitled to consideration?
2. Does Chapter 336 of the Acts of 1962 apply to a proposal submitted by the Division of the Blind rather than by a blind person duly licensed by such Division?

3. Does Chapter 336 of the Acts of 1962 or any other provision of law require that the proposal submitted by the Division of the Blind be accepted and that all others be excluded from consideration?
4. Must the proposal submitted by the Division of the Blind be accepted even though it is determined that such proposal does not comply with the requirements and specifications as set forth in the invitation to bidders?"

Chapter 336 of the Acts of 1962 provides as follows:

"The officer, board or other authority in charge of any building or property of the commonwealth, or any county, city or town thereof, shall grant to a blind person, duly licensed therefor by the division of the blind, authority to operate in such building or on such property a *stand* for the vending of newspapers, periodicals, confections, tobacco products and such other articles as such officer, board or other authority provides wherever a *vending stand* may be properly and satisfactorily operated by a blind person." (Emphasis supplied.)

I am aware that mandatory language has been used in the quoted statute, and that blind persons must be given an opportunity to operate vending stands in appropriate places within public buildings. However, St. 1962, c. 336 was by no means intended to require that all vending services in buildings belonging to the Commonwealth or to political subdivisions thereof be operated by blind persons, and the language of the statute does not support such a construction.

The statute uses the word "stand" twice, and avoids reference to any other type of vending apparatus. Clearly, use of the word was deliberate, and intended to indicate that the statute had no application to vending operations of a different character. Were this statute to be given an all-inclusive construction, no vending equipment could be installed which could not be operated by a blind person, thus eliminating many types of cafeteria service, as well as preventing the use of many automatic machines which do not need the presence of an attendant. The purpose of c. 336 is to ensure the availability to blind persons of positions which they may appropriately fill. The statute is not intended to force a reduction of vending services so that all equipment may be operated by the blind.

Consequently, the proposal submitted by the Division of the Blind should not receive absolute priority, but need only be considered on the same footing as other bids that have been submitted. I find that the fact that the proposal has been submitted by the Division of the Blind on behalf of a blind person whom they are to select, rather than by the blind individual himself, should not in and of itself relieve the Department from the responsibility of considering the bid.

However, it is clear that the proposal does not conform to the specifications of the Department of Corporations and Taxation. Although the Department has clearly requested sixteen automatic vending machines, the bid in question offers to provide only a vending stand and two mobile food carts. In addition, it appears that the Division of the Blind does not contemplate the payment of any commission to the Commonwealth.

Even had the proposal conformed to specifications of the Department, it is my opinion that it need only have been considered in comparison



with competing bids. Chapter 336 of the Acts of 1962 is limited in its application to "vending stands", and does not affect a sizable operation such as that contemplated by the Department of Corporations and Taxation.

Therefore, my responses are as follows:

I answer Question #1 in the negative.

I answer Question #2 in the affirmative.

I answer Question #3 in the negative.

I answer Question #4 in the negative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Application of G.L., c. 29, § 9B as to expenditures of certain funds for highway construction.*

Nov. 26, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works*.

DEAR COMMISSIONER: — You have asked my opinion as to whether G.L., c. 29, § 9B is applicable to the following acts relating to authorizations to spend certain funds for the purpose of highway construction:

Chapter 685 Acts of 1950 Bond Issue

Chapter 556 Acts of 1952 Bond Issue

Chapter 403 Acts of 1954 Bond Issue

Chapter 718 Acts of 1956 Bond Issue

Chapter 32 Acts of 1958 Highway Program

Chapter 782 Acts of 1962 Highway Program

Earlier opinions of this Department had established that the funds to be expended for the accelerated highway program provided under c. 306 of the Acts of 1949 were not applicable to the provisions of G.L., c. 29, § 9B. I concur with these opinions. The expenditures here under consideration are for the same purpose and are of the same type as those authorized under c. 306, Acts of 1949.

It is my opinion that G.L., c. 29, § 9B is not applicable to the above-enumerated acts.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Department of Public Works is authorized under G.L. c. 31, § 43 (h) to pay any employee meeting the requirements for reimbursement of legal services rendered him in his defense and is to be paid from the same account as the employee's salary.*

DEC. 2, 1963.

HON. JACK P. RICCIARDI, *Commissioner of Public Works*

DEAR COMMISSIONER RICCIARDI: — I have received your letter of October 25, 1963, relative to the bill for legal services presented to your Department by Mr. Thomas P. Sterczala. You have requested an opinion as to whether or not the bill should be honored, and — if payment is deemed proper — to what account the fee should be charged.

The bill in question is for attorney's fees relative to the securing of the reinstatement of Mr. Sterczala as a laborer in the Department of Public Works. Payment of such amounts is governed by Mass. G.L. c. 31, § 43 (h), as amended, which provides in part as follows:

"Any person holding office of employment under permanent appointment in the official or labor services of the commonwealth, or any county, city, town or district thereof, who has incurred expense in defending himself against unwarranted discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position, shall, if he engages an attorney for such defense, be reimbursed for such expense. . . .

"Any such person shall, upon written application made to his appointing authority within thirty days from final disposition of his case, be reimbursed from the same source from which his salary is paid. . . ."

The statute further provides that in no event shall such reimbursement exceed the sum of \$900. There are also set forth the portions of such maximum amount that are to be paid for representation at different hearings and for particular expenses.

The effect of the statute is clear. If the employee meets the requirements of the section, he is entitled to be reimbursed for legal services rendered him in connection with his defense, such reimbursement to conform to the payment scale specified in the statute and to be charged to the account from which the said employee's salary would ordinarily be paid.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Chapter 32, § 90B of the G. L. allows a pensioner to lawfully waive the entire amount of a retirement allowance.*

DEC. 2, 1963.

HON. GEORGE H. BURROWS, *Acting Director, Civil Defense Agency*

DEAR MR. BURROWS: — I have received your letter of October 31, 1963, wherein you suggest that you may desire to waive the retirement allowance payable to you from the Commonwealth. You have asked whether, pursuant to § 90B of c. 32 of the General Laws, the total amount of a retirement allowance may lawfully be waived.

Chapter 32, § 90B reads in relevant part as follows:

"Any person retired from the service of the commonwealth, or any of its political subdivisions, . . . *may waive and renounce* for himself, his heirs and legal representatives *any portion of the pension or retirement allowance payable to him* from the commonwealth, or any of its political subdivisions, for such period as he may specify in such waiver and renunciation. . . ." (Emphasis supplied.)

The statute thus authorizes the pensioner to waive "any portion" of his retirement allowance, and the question arises whether such language indicates that waiver of the entire amount may be permitted.

I am aware of the fact that the word "portion" ordinarily refers to a part that is less than the whole. However, in the present case "portion" is preceded by the word "any", and — considering the context in which it appears — in my opinion impliedly includes the whole. In common usage, the granting of control over any part or portion of a sum of money to, for example, a trustee, gives the trustee power, if he chooses, to use or dispose of any percentage of the fund, up to and including one hundred per cent. (See *Boyden v. Stevens*, 285 Mass. 176, 179 (1934).) There is no practical basis for insisting that a pensioner who desires to waive his retirement allowance be required to retain some infinitesimal amount in order that the entire sum owed him not be released.

Your request was limited in scope, referring only to the question of waiver of the total amount of a retirement allowance. No related issues having been raised, nothing further is treated herein. Therefore, addressing my response solely to the single inquiry presented in your request, and treating no related issue, I advise you that pursuant to G.L. c. 32, § 90 B the total amount of a retirement allowance may lawfully be waived.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The issuance of trading stamps to one's own customers, and redemption of same, do not by themselves constitute the operation of a trading stamp company, G.L. c. 93, § 14 (1).*

DEC. 9, 1963.

HON. GEORGE F. KILLGOAR, *Deputy State Treasurer*

DEAR MR. KILLGOAR: — I have your letter of November 13, 1963 relative to interpretation of the Trading Stamp Law (c. 632 of the Acts of 1958). You have asked whether Collamati's Super Markets, Inc. comes within the definition of "trading stamp company" contained in this statute. I understand that Collamati's operates one store in the Commonwealth, and gives trading stamps to its own customers exclusively. It does not distribute stamps to other retailers and does not redeem stamps for other retailers.

The definition of "trading stamp company" contained in § 1 of St. 1958, c. 632 (now Mass. G.L. c. 93, § 14L) provides:

“‘Trading stamp company’, any person engaged in distributing stamps for retail issuance by others, or in redeeming trading stamps for retailers, in any way or under any guise.”

Upon the facts it is clear that Collamati's does not conform to the definition. Collamati stamps are issued to no other retailers, and the firm is not engaged in the business of redeeming trading stamps for other concerns. The issuance of trading stamps to one's own customers, and redemption of the same, do not by themselves constitute the operation of a trading stamp company.

The words “in any way or under any guise” which conclude the paragraph are not intended to expand the definition. They simply modify the conditions contained in the section, so that companies actually within the confines of the definition will not be able to distribute or redeem stamps in a way that might avoid the operation of the Trading Stamp Law. The phrase is not meant to include a firm which otherwise does not conform to the definition.

Therefore, as set forth above, I advise you that the business in question does not come within the definition contained in St. 1958, c. 632, and, consequently, is not required to comply with the provisions of the Trading Stamp Law.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The property of any debtor in reorganization in the Federal Bankruptcy Act should be administered by the Department of Public Works, or by any agency of the Commonwealth, as would be the taking by eminent domain of the property of any citizen of the Commonwealth.*

DEC. 10, 1963.

COMMISSIONER JACK P. RICCIARDI, *Commissioner of Public Works*

Re: Taking by Eminent Domain of Property of Railroad Corporation in U.S. Bankruptcy Reorganization.

DEAR COMMISSIONER: — By letter of November 14, 1963, you advised me that present plans for the construction of Interstate Route 91 in the City of Springfield requires the Commonwealth to acquire a considerable portion of the yards and appurtenances of the New York, New Haven and Hartford Railroad Company, and the relocation of certain railroad facilities. At the same time you wrote that title to the property of the railroad is now held by Trustees in Reorganization appointed by the United States District Court in New Haven, Connecticut. In view of the present ownership of the property you requested my opinion on proper procedures to effect the taking of the necessary property.

Your attention is respectfully invited to letter on this same subject from the Chief of the Eminent Domain Division, Department of the Attorney General, dated August 12, 1963, addressed to the Secretary of the Department of Public Works.

It is my opinion that the constitutional requirements and statutory procedures for the compensation of a citizen whose property is taken

by eminent domain by the Commonwealth provide all the protection for a debtor in reorganization that is necessary under the provisions of the Federal Bankruptcy Act. Chapter 79 of the General Laws permits a debtor in reorganization to recover damages arising from the taking of its property. Proceedings thereunder would substitute money for property taken. The amount of damages would make whole the debtor in reorganization and thereby preclude any frustration of the purposes of the Bankruptcy Act or the particular reorganization proceedings.

In *Palmer v. Massachusetts*, 308 U.S. 79 (1939) the Supreme Court of the United States considered the basic issue of the relationship between the power of the Federal Bankruptcy Court over the property of an insolvent railroad and the power of the Commonwealth so to regulate the operation of the railroad. That power of the Commonwealth so to regulate was described by the Court as “. . . this old and familiar power . . .” and “. . . the traditional power of the states to regulate . . .”.

The Court found that the grant by Congress to Federal Bankruptcy Courts of “exclusive jurisdiction over the debtor and its property”, 11 U.S.C.A. 205, did not authorize those Courts to impose restrictions on the power of the Commonwealth to regulate local transportation.

The power of the Commonwealth, as a sovereign, to take property by eminent domain for public use is inherent in the very existence of government. *Kohl v. U.S.*, 91 U.S. 367, *U.S. v. Jones*, 109 U.S. 513, Nichols, On Eminent Domain, Volume I, Section 1.14. It is created simultaneously with the establishment of government. It is subject only to those restrictions imposed upon it by the sovereign itself. It is more “old”, more “familiar”, and more “traditional” than the power of the Commonwealth considered and upheld in identical legal circumstances by the U.S. Supreme Court in *Palmer v. Massachusetts*, *supra*. It is also evident that the taking of property by eminent domain for the purpose of construction of highways would be included in the broad meaning of the regulation of local transportation.

Conferences have been held with the representatives of the Trustees in Reorganization and of the Law Department of the New York, New Haven, and Hartford Railroad Company. As a result of these conferences, certain procedural suggestions were agreed between the representatives of the railroad and the Chief of the Eminent Domain Division, Department of the Attorney General. It is my recommendation that when a railroad is in reorganization, the taking authority make every possible effort to obtain through negotiation the willing cooperation of the condemnee through the conveyance by deed or taking by eminent domain of the property required to carry out the intended public project, wherever it may be located. In the event that such negotiation proves to be unsuccessful, it is my opinion that the property of any debtor in reorganization in the Federal Bankruptcy Act should be administered by the Department of Public Works, or by any agency of the Commonwealth, as would be the taking by eminent domain of the property of any citizen of the Commonwealth.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The standard which must guide disposition of firearms by any state department or the state Purchasing Agent is the best interests of the Commonwealth.*

DEC. 17, 1963.

HONORABLE ALFRED C. HOLLAND, *Purchasing Agent, Executive Office for Administration and Finance.*

DEAR MR. HOLLAND: — I have received your letter of October 11, 1963 in which you refer to the disposition of firearms confiscated by the Department of Natural Resources. You have requested an opinion as to whether firearms confiscated pursuant to §§ 7 and 51 of c. 131 of the General Laws may properly be sold to the general public. I understand that it has been customary heretofore to transfer such weapons to the Department of Public Safety so that they may be destroyed.

Section 7 provides for confiscation of firearms used or possessed by a minor who is not licensed; likewise, § 51 authorizes the taking of such weapons from unlicensed aliens. Section 7 provides in part as follows:

“... Any firearm whether discharged by air, mechanical action or otherwise, used or possessed by any minor who is not licensed, or who is not accompanied as provided in this section, or which is used in violation of this section, shall be confiscated by any officer empowered to enforce this section, *and shall be disposed of by the director of law enforcement for the best interest of the commonwealth*, after a hearing, due notice of which has been given.” (Emphasis supplied.)

Section 51 provides that “any firearm owned by an alien or in his possession or under his control in violation of this section shall be forfeited to the commonwealth”. Such weapons are to be disposed of by the Department “for the best interests of the commonwealth”, as is the case with firearms taken from minors.

Although disposition of the weapons is the responsibility in the first instance of the Department of Natural Resources, the Department may properly transfer them to the State Purchasing Agent, since the Purchasing Agent is charged with “Disposal of obsolete, excess and unsuitable supplies, salvage and waste material and other property and the transfer of same to other departments, offices and commission”. [Mass. G.L. c. 7, § 22 (12).] Presumably, disposition by the Purchasing Agent will likewise be carried out with the best interests of the Commonwealth in mind.

I am aware of the fact that the list of firearms presently in the custody of the Department of Natural Resources has an estimated value of from \$1200 to \$1500. A possible solution is sale of the weapons so that their value could be realized in revenue to the State. It is assumed the proceeds from an auction sale would be less than the market value of the weapons.

However, the standard which must guide disposition by either the Department or the State Purchasing Agent is the best interests of the Commonwealth. Keeping this in mind, it becomes clear that considerations other than monetary become of consequence.

The problems posed by unauthorized and improper use of firearms are already acute. From a public safety point of view, I would question the wisdom of offering weapons to the public by means of an auction

or sale of any kind. Monetary considerations notwithstanding, the best interests of the Commonwealth might well persuade the officials involved to exercise their discretion in such a way as to avoid placing a large number of firearms on the open market. These weapons may of course still be destroyed, or, if it is preferred, could perhaps be employed by the Department of Public Safety for the use of its law enforcement officers.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Secretary of State may lawfully certify on appointment made by the Commissioner of Public Works to a special Commission established by c. 156 of the Resolves of 1963 which is in line with the well-established rule of law which militates against the creation of an agency.*

DEC. 17, 1963.

HON. KEVIN H. WHITE, *Secretary of the Commonwealth*

DEAR SIR: — In your letter of December 2, 1963 you have asked my opinion whether the Secretary of the Commonwealth may lawfully certify an appointment made by the Commissioner of Public Works to a special commission established by c. 156 of the Resolves of 1963.

The present incumbent in the office of Commissioner of Public Works was appointed by the authority of Mass. G.L. c. 16, § 2 (as amended by St. 1956, c. 717). By St. 1963, c. 821, c. 16 of the General Laws was further amended by striking out the whole of former Mass. G.L. c. 16 and inserting in place thereof a whole new c. 16. Under the provisions of the 1963 legislation a new Public Works Commissioner and four Associate Commissioners are to be appointed by the Governor.

St. 1963, c. 821, § 1 provides:

“There shall be a department of public works, in this chapter called the department, which shall be under the supervision and control of a public works commission, in this chapter called the commission. Said commission shall consist of five members, not more than three of whom shall be of the same political party, who shall be appointed by the governor, with the advice and consent of the council . . . The governor shall from time to time designate a member of the commission as the commissioner of public works, in this chapter called the commissioner, and the other four members shall be associate commissioners. The commissioner shall be the chairman of the commission. . . .”

This statute was signed and approved by the Governor of the Commonwealth on November 15, 1963. On the same day a letter was sent to the Secretary of the Commonwealth by the Governor under the provisions of Article XLVIII of the Amendments to the Constitution, the Referendum II, declaring this statute to be an emergency law. By virtue of this executive act, the statute as a whole became effective on November 15, 1963.

In this connection, you have called my attention specifically to § 2 of c. 821 of the statutes of 1963. This section provides that the old Com-

mission of Public Works consisting of the Commissioner and two Associate Commissioners was abolished as of the effective date of this statute.

*St. 1963, c. 821, § 2.*

"The commission of public works, consisting of the commissioner of public works and two associate commissioners, in existence on the effective date of this act, and the office of director of the division of waterways as so existing, are hereby abolished, and their respective powers and duties are hereby transferred to the public works commission, and the chairman of said commission, established by section one of chapter sixteen of the General Laws, as appearing in section one of this act."

When interpreting a section of a statute, the statute must be construed in its entirety. A part cannot be separated from the whole. This is in line with well-established rules of construction which require that a statute be read as a whole.

"The legislative intent is to be ascertained from the statute as a whole, giving to every section, clause and word such force and effect as are reasonably practical to the end that, as far as possible, the statute will constitute a consistent and harmonious whole, capable of producing a rational result consonant with common sense and sound judgment. . . ." [*Haines v. Town Manager of Mansfield*, 320 Mass. 140, 142 (1946).]

The present statute provides for a sweeping reorganization of the Department of Public Works. This department is closely allied with the day-to-day needs of the Commonwealth. It must provide continuing services unhampered by a change of personnel. The transition envisioned by this statute cannot be made overnight. There are practical difficulties involved. The Legislature was not unaware of these difficulties. This statute provides for the period of transition. SECTION 2 should be read in consonance with the statute as a whole and especially with SECTION 4.

*St. 1963, c. 821, § 4.*

"The tenure of the present commissioner of public works shall cease upon the qualification of his successor appointed under the provisions of section one of this act. The tenure of the present associate commissioners shall cease upon the qualification of two associate commissioners appointed under the provisions of section one of this act."

This section provides not only for the practical necessities of continuous public service but is in line with the well-established rule of law which militates against the creation of a vacancy.

67 C.J.S. *Officers* § 50 (1950).

"The law abhors vacancies in public offices, and courts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions. . . ."

In light of the action taken by the Legislature, it is my opinion that the Secretary of the Commonwealth may lawfully certify the appointment by the present Commissioner of Public Works made under the authority of c. 156 of the Resolves of 1963.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.



*All decisions of the Registrar of Motor Vehicles are subject to appeal under c. 90, § 28, though no action or decision shall be stayed pending such appeal with exception of appeals from cancellation of motor vehicle liability policies which shall remain in full force and effect pending appeal.*

DEC. 18, 1963.

HON. JAMES R. LAWTON, *Registrar of Motor Vehicles.*

DEAR REGISTRAR LAWTON: — I have received your letter of October 4, 1963 relative to the rights of appeal of persons aggrieved by rules or decisions of the Registrar of Motor Vehicles. You have requested my opinion as to the nature of decisions which may be appealed, and as to whether such appeal operates to stay action by the Registrar pursuant to the decision being reviewed.

Appeals from decisions of the Registrar are governed by Mass. G.L. c. 90, § 28, which provides in part as follows:

"Any person aggrieved by a ruling or decision of the registrar may, within ten days thereafter, appeal from such ruling or decision to the board of appeal on motor vehicle liability policies and bonds . . . , which board may, after a hearing, order such ruling or decision to be affirmed, modified or annulled; *but no such appeal shall operate to stay any ruling or decision of the registrar. . . .*" (Emphasis supplied.)

Nothing in the cited section indicates that appeals are meant to be available only from discretionary rulings, and not from so-called mandatory decisions rendered by the Registrar. Language in the case of *Ullian v. Registrar of Motor Vehicles*, 325 Mass. 197, 199, suggests that the scope of appeal should not be so limited.

"The word 'appeal' as appearing in the statute, G.L. (Ter. Ed.) c. 90, § 28, comprehends all rulings and decisions of the registrar by which the holder of the license claims to be aggrieved."

Even where the Registrar is apparently required by statute to issue a particular ruling or take certain action, the decisions by the Registrar on factual matters and on the applicability of given statutes may still be questioned. Since nothing in the section governing appeals indicates that such cases should be excluded from the section's provisions, it would appear that all actions or decisions by the Registrar — whether mandatory or discretionary — are subject to review under § 28. The language of the statute is clear that the taking of such appeals does not operate to stay the ruling or decision that is to be reviewed.

Appellate procedure operates somewhat differently where cancellation of motor vehicle liability insurance is involved. In such a case, action by the insurer rather than by the Registrar is to be specifically reviewed, and appeals are governed by Mass. G.L. c. 175, § 113D (as amended). The section provides for appeal to the Board of Appeal on Motor Vehicle Liability Policies and Bonds; the decision of the Board may be appealed to a Justice of the Superior Court, whose ruling shall be final.

However, contrary to appeals brought under c. 90, § 28, the taking of an appeal under c. 175, § 113D does operate to stay cancellation of the policy.

"If the complaint relates to the cancellation of such a policy or bond, the filing of the complaint shall operate to continue the policy or bond in full force and effect, but not beyond its date of expiration in any case, pending the finding and order of the board, and pending the decree of the superior court or a justice thereof if an appeal from such finding and order is taken. . . ."

Therefore, I advise you that all decisions of the Registrar are subject to appeal under c. 90, § 28, though no action or decision shall be stayed pending such appeal. On the other hand, appeals from cancellations of motor vehicle liability policies shall be taken pursuant to c. 175, § 113D, and the taking of such appeals shall operate to continue the policy in full force and effect.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The trustees of the Lowell Technological Institute are bound to another year's extension of the contract with Gordon Linen Service because of their failure to send the required registered mail notice in accordance with the terms of the contract.*

DEC. 18, 1963.

MR. EVERETT V. OLSEN, *Assistant to the President, Lowell Technological Institute*.

DEAR MR. OLSEN: — You have requested my opinion relative to the laundry service contract entered into by the Board of Trustees of the Lowell Technological Institute. In your letter, you posed the following questions:

"1. Must the Institute grant the Gordon Linen Service a one-year contract inasmuch as a written registered mail notice was not sent to them specifically stating that the Trustees desire to terminate this contract?

2. If a new contract were to be drawn with another contractor what is the earliest possible date that this contract would legally take effect?

3. If it is your opinion that the proper notice has not been given to the contractor to terminate the contract would it be proper at this time for the Board of Trustees to approve an extension of the contract with Gordon Linen Service?"

It is my understanding that the Board of Trustees, as of September, 1958, entered into a contract with Gordon Linen Service, which contract has been extended from year to year, and — at least up to September, 1963 — was still in effect. The contract contains the following clause:

"Further, unless otherwise terminated as hereinafter provided, this contract shall be automatically renewed for the same length of term unless either party, 30 days before the end of the original or extended term shall give to the other a written, registered mail, notice of its desire to terminate this contract at the end of said term."

It is a fundamental proposition of contract law that notice to terminate a contract must be reasonable, clear and unequivocal, and in accordance with the terms of the contract. Since the contract entered into with Gordon Linen Service specifies that there shall be automatic renewal unless written notice to the contrary is given by registered mail, the Trustees are bound to comply with the notice requirement, and must do so in order to terminate the agreement. Having failed to send the required registered mail notice thirty days prior to the end of the extended term, the Trustees are bound to another year's extension of the contract with Gordon Linen Service.

Since they are bound as set forth above, the Trustees have no choice but to deal with Gordon Linen Service during the present year. So far as future years may be concerned, there is nothing to prevent further extensions of this contract, since I am aware of no provisions which would require the Trustees to submit the matter of laundry service to public bidding. Since it is clear that the Gordon Linen contract must continue in effect throughout this year, I have not treated with your second question.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Eastern Massachusetts Bridge Association's tournament does not have chance as a significant element in its game and can therefore be issued a license to conduct its tournament on Sunday providing it does not commence prior to one o'clock in the afternoon.*

DEC. 26, 1963.

HONORABLE FRANK S. GILES, *Commissioner of Public Safety*.

DEAR COMMISSIONER GILES: — I have received your request for an opinion relative to the legality of the holding of a national bridge tournament by the Eastern Massachusetts Bridge Association in the City of Boston. You have posed the following questions:

1. Can such a tournament legally be conducted under a license issued by the City of Boston and approved by the Commissioner of Public Safety pursuant to Mass. G.L. c. 136?
2. Would this game in and of itself constitute a lottery?
3. Would the game constitute a lottery when the entire proceeds are not exclusively and wholly donated to charitable, civic, educational, fraternal or religious purposes?

In order to reply fully to your inquiries it has been necessary to investigate the manner in which the proposed tournament is to be conducted. It appears that the tournament is decided wholly on the basis of the skill of the participants, with the element of chance quite remote. In fact, I have discovered that the hands to be played are prearranged so that even the element of chance that would be created by the dealing of cards is eliminated.

You have referred in your letter to G.L. c. 271, § 22A, which provides:

“Nothing in this chapter shall authorize the prosecution, arrest or conviction of any person for conducting or promoting, or for allowing to be conducted or promoted, a game of cards commonly called whist or bridge, in connection with which prizes are offered to be won *by chance*; provided, that the entire proceeds of the charges for admission to such game are donated solely to charitable, civic, educational, fraternal or religious purposes.” (Emphasis supplied.)

Likewise, G.L. c. 271, § 7, which section governs lotteries and disposal of property by chance, is relevant.

“Whoever sets up or promotes a lottery for money or other property of value . . . with intent to make the disposal thereof dependent upon or connected with chance by lot, dice, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property . . . , shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year.”

It is clear that it is the attention to the element of *chance* which is significant in these two statutory sections. What is prohibited under § 7 is gaming which is dependent primarily upon chance, and for which prizes are given. Section 22A permits the holding of bridge games in which chance is an element, provided that proceeds of admission charges are donated to one or more of the specified uses. Thus it is implied that bridge games based on chance in which the proceeds are not so devoted shall not be held. However, investigation indicates that the tournament to be sponsored by the Eastern Massachusetts Bridge Association is not of a type in which chance is a significant element. Therefore, I advise you that this tournament does not come within the explicit prohibition of § 7 or the implied prohibition of § 22A.

My response to your first question relative to licensing of the tournament is governed by G.L. c. 136, § 4(1), as amended, which provides in part:

“The mayor of a city or the selectmen of a town . . . may grant . . . a license to hold on Sunday . . . any game, sport, fair, exposition, play, entertainment or public diversion for which a charge in the form of payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein. . . . ; provided, . . . that such application, except an application to conduct an athletic game or sport, shall be approved by the commissioner of public safety. . . .”

Pursuant to this section, therefore, a license may be issued so that the proposed tournament can be conducted on a Sunday, provided that activities do not commence before one o'clock in the afternoon, and provided further that the license application is approved by the Commissioner of Public Safety.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Attorney General advises the Department of Public Works, Metropolitan District Commission, and the Massachusetts Turnpike Authority as to necessary reforms in their land-taking procedures.*

DEC. 27, 1963.

JACK P. RICCIARDI, *Commissioner, Department of Public Works.*

Re: *Land-Taking Procedures Department of Public Works.*

DEAR SIR:—With your support and that of the Federal Bureau of Public Roads the Eminent Domain Division of this Department was authorized to establish a new section for the analysis and codification of the laws of the Commonwealth relating to all aspects of its highways. For many months the initial review of those laws has been in progress during the course of which the existing law and procedures in connection with the taking of property by eminent domain by the Commonwealth have been considered. One product of that work has been the filing with the General Court of a legislative program by me. If enacted, it will improve the law and procedures governing the exercise of that sovereign power of eminent domain by protecting more promptly and equitably the rights of the individual citizen.

During the study of present practices it became apparent that the Department of Public Works continues to employ some land-taking procedures, established by your predecessors, which do not comply with the existing law. The purpose of this letter is to call your attention to those land-taking practices of that Department which are in urgent need of change. One is the award at the time land is taken of only nominal damages in the amount of one dollar without regard to the severity of the damage actually caused. Another is the failure of the Department in many instances to give written notice of the taking to the owner of the land taken. Finally, the delay in processing damage claims by the Department is such that the landowner must wait many months and often years before any compensation is received.

Those three practices impose hardships on landowners whose property is taken. Many of them feel compelled to bring costly lawsuits against the Commonwealth in order to get fair compensation. That adds to the congestion in the courts and creates a significant demand on the staff and financial resources of both the Department and the Attorney General and the Department of Public Works. Meanwhile the interest to be paid by the Commonwealth accrues with each month that damage claims remain unpaid. On November 6, 1963 the rate of interest on such claims was increased by the General Court by half from four to six per cent (St. 1963, c. 793, § 1).

Under normal circumstances these problems and their solution would have been brought to your attention many weeks ago with full confidence that you would take prompt remedial action. However, passage of the Department of Public Works Reorganization Act argued for postponement of this letter until it could be addressed to the members of the newly created Public Works Commission. The delay in the appointment of the new Commissioners was not anticipated or expected by me in view of the emergency preamble inserted in the Reorganization Act by the Governor on November 15, 1963, declaring that postponement would "defeat its purpose which is to reorganize the Department of Public Works immediately in order that the important highway programs of

the Commonwealth may be undertaken without delay." (St. 1963, c. 821.) However, it is not now clear when the appointment and confirmation of the new Public Works Commissioners will be accomplished. In any case, I am certain that they would agree that any possible administrative convenience to them is greatly outweighed by the benefit to citizens of the Commonwealth which will accrue from immediate implementation of this letter.

I am aware of the difficulties confronting the Department of Public Works in attempting at this time to act on a problem of this scope. The active management group of that Department may soon be faced with removal. Through no fault of the present Commissioners several key positions are not presently staffed. However, the matters to which this letter refers cannot wait any longer. Whatever view one might take of the merits and urgency of the Reorganization Act, it is clear that these problems constitute at present a genuine emergency.

The present basic administrative problem appears to be the fact that appraisals and title examinations are not completed by the Department of Public Works until long after property is taken by eminent domain. There is now no determination of damages at the time they should be awarded. There is now no determination of ownership at the time the owners should be notified. Title and appraisal information are not adequate under present procedures at the time payment should be made to the property owners.

I must therefore advise you that compliance with existing law requires the following immediate reforms in the land-taking procedures of the Department of Public Works.

(1) All Department appraisals and title searches relative to land taken shall be completed before the adoption of the order of taking.

(2) Realistic awards of damages, based upon accepted appraisal principles, shall be made upon the adoption of any order of taking. In this connection it is incumbent upon the Department to vote immediately such awards for takings for which orders have already been issued but for which payment has not been made.

(3) Notice of any taking shall be sent promptly thereafter to all owners including all mortgagees of record.

(4) All administrative preliminaries to the payment of damages within the control of the Department shall be completed at a sufficiently early stage to permit issuance of damage checks within a short time after a taking has been made.

(5) No further land takings shall be made by the Department until compliance with the above requirements can be achieved.

The first two of these reforms are based on the statutory requirements that damages be awarded to persons whose land is taken "at the time when the order of taking is adopted." (G. L. c. 79, § 6.) The Supreme Judicial Court of Massachusetts has condemned the practices of making nominal awards when damages are plainly serious as "an obvious disregard of the legislative purpose . . . to obtain an award of just compensation by fair initial administrative action." (*Newton Girl Scout Council v. Massachusetts Turnpike Authority*, 335 Mass. 189, 190, note 2.) Obviously, no such fair award of damages can be made until completion of an adequate title search and appraisal.

Written notice to all owners and mortgagees is expressly required by the eminent domain statute. (G.L. c. 79, § 8). Compliance with this requirement means that the Department must "use reasonable diligence to ascertain the owners of the land taken." (7 Op. Atty. Gen. 57, 59 1923) .)

The fourth of the above reforms concerning prompt payment procedures is required by the Massachusetts Constitution. The Supreme Judicial Court has construed the constitutional guarantee of reasonable compensation for property taken as compelling payment of such compensation without "unreasonable delay." (*Haverhill Bridge Proprietors v. County Commissioners of Essex*, 103 Mass. 120, 125). While there is no set rule as to when a delay becomes "unreasonable", it is my opinion that the delays caused by the present procedures of the Department in payment of damages fall within that category.

This letter is not intended to and does not cast doubt on the integrity and good faith of the management or personnel of the Department of Public Works. On the contrary, it appears that the practices with which it deals began under your predecessors. Unfortunately the property owner has no effective remedy against most of the violations referred to herein however serious they may be. I therefore feel that this Department and the Department of Public Works have a special responsibility to invoke every available means to assure their discontinuance. Accordingly, I urge you to take immediate steps to bring the landtaking procedures of the Department into conformity with the law, as outlined in this letter.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

DEC. 27, 1963.

HONORABLE ENDICOTT PEABODY, *Governor, Commonwealth of Massachusetts*.

YOUR EXCELLENCY: — Enclosed is a copy of a letter to the Commissioner of Public Works, calling his attention to certain urgently needed changes in the landtaking procedures of his Department.

The unfortunate consequences to the public of the practices referred to in the enclosed letter are reason enough for reform. It is my opinion, moreover, that they are also in violation of law. It is therefore my duty not merely to recommend such reform, but to insist upon it.

Primary responsibility for instituting the necessary changes, of course, lies with the Commissioner of Public Works and his staff. However, Chapter 821 of the Acts of 1963, reorganizing the Department of Public Works, has since November 15 of this year vested broad control over that Department in the Office of the Governor. The problems created by the dilution of the powers of the Commissioner which has necessarily accompanied this shift in ultimate control are particularly acute at this time, because the impending changes in the personnel and organization of the Department of Public Works make it exceedingly difficult for its existing management to take effective action. For that reason I had in-

tended to defer writing the enclosed letter until the new Commission of Public Works had assumed office in accordance with the reorganization act. However, I did not anticipate the delay in the appointment and confirmation of the new Commissioners.

It is my hope that you will agree that the effect on citizens whose property has been taken by the Commonwealth far outweighs any conceivable administrative convenience to the new Commissioners which further delay might provide.

These important reforms cannot be effected without the full co-operation of the Office of the Governor with this Department and with the Commissioner of Public Works. I trust that such cooperation will be immediately forthcoming.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

DEC. 27, 1963.

WILLIAM F. CALLAHAN, *Chairman, Massachusetts Turnpike Authority*.

DEAR MR. CHAIRMAN: — I have been advised that the land-taking procedures employed by the Massachusetts Turnpike Authority are very similar to those used by the Department of Public Works. Enclosed for your information is a copy of a letter delivered today to the Department of Public Works stating in detail my opinion of its present administration of the taking of land by eminent domain and listing the necessary corrective action.

The continuing review of the law governing the many aspects of the construction, use and maintenance of the highways of the Commonwealth has resulted in the conclusion that Massachusetts Turnpike Authority is required to comply with the provisions of Chapter 79 of the General Laws and the Constitution of the Commonwealth.

It is my opinion that the present land-taking procedures of the Massachusetts Turnpike Authority violate the law in the same manner as the Department of Public Works as set forth on page 2 of the enclosure herewith. Those violations have imposed serious hardships on those whose property has been taken by the Massachusetts Turnpike Authority.

It is my further opinion that the following administrative action must be taken immediately by the Massachusetts Turnpike Authority in order to conform its practice and procedures to the laws of the Commonwealth:

(1) All appraisals and title searches relative to land taken by the Massachusetts Turnpike Authority shall henceforth be completed before the adoption of an order of taking.

(2) Realistic awards of damages, based upon accepted appraisal principles, shall be made upon the adoption of any order of taking. In this connection it is incumbent upon the Turnpike Authority to vote immediately such awards for takings for which orders have already been issued but for which payment has not been made.

(3) Notice of any takings shall be sent promptly to all owners including all mortgagees of record.



(4) All administrative preliminaries necessary to the payment of damages shall be completed promptly after the taking to permit the issuance and delivery of damage checks without unreasonable delay.

(5) No further land takings shall be made by the Massachusetts Turnpike Authority until compliance with the above requirements has been achieved.

It is my hope that as a result of this letter and enclosure you will immediately direct the commencement of the administrative reforms set forth herein. It would be greatly appreciated if you would advise me in writing within thirty days of the date of this letter of the action taken or to be taken in order to carry out the provisions of this opinion. Of particular, but not exclusive, interest at this time will be the action taken under the second procedural reform listed above. To avoid any misunderstanding, it would be appreciated if you would immediately direct the appropriate member of your staff to forward a list to this office of the property and former owners thereof which will be affected by procedural reform number two because payment has not yet been made in accordance with the law which requires that administrative change.

I trust that this Department will be the recipient of the prompt and wholehearted cooperation of your entire staff as evidence of your desire to provide to all citizens of the Commonwealth prompt and equitable protection of their rights which may be affected by any action taken by the Massachusetts Turnpike Authority.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

(A letter embodying the same comments, suggestions, and instructions as the above, has this day been sent to Mr. Robert F. Murphy, Chairman of the Metropolitan District Commission, 20 Somerset Street, Boston.)

*The Department of Public Works may purchase, rent or lease equipment for the performance of the engineering services, excluding traffic studies, and other technical and expert services in connection with the projects authorized and forced by said statutes.*

JAN. 2, 1964.

COMMISSIONER JAMES F. FITZGERALD, JR., *Department of Public Works*.

Re: Bond Issue Accounts, Authority to Purchase, Rent or Lease Equipment.

DEAR COMMISSIONER: — Reference is made to my opinion on this subject addressed to your predecessor, dated September 3, 1963, and two letters dated December 4 and December 20, 1963 from your Department requesting my opinion on whether the Department of Public Works can purchase, rent or lease office equipment for Sections and Divisions of that Department for which such equipment is needed as a result of the increase in the amount of work in connection with projects authorized under Bond Issue Accounts.

On September 3, 1963 I informed your predecessor of my opinion that the Department of Public Works can purchase, rent or lease equipment for the use of the Contract Division and the Eminent Domain Division of the Department of the Attorney General and charge the cost thereof to an appropriate Bond Issue Account. I also rendered the opinion that the cost of transportation of personnel of the Department of Public Works whose activities are directly connected with projects financed from Bond Issue Accounts can be paid from the funds in said accounts.

Chapter 306 of the Acts and Resolves of the General Court of 1949, Chapter 685 of the Acts and Resolves of 1950, Chapter 556 of the Acts and Resolves of 1952, Chapter 403 of the Acts and Resolves of 1954, and Chapter 718 of the Acts and Resolves of 1956 authorize the issue and sale of bonds to meet expenditures necessary to execute the accelerated highway program. Included in each of those laws is the following language: "The cost of the work authorized . . . shall include all project payments, property damages, expenses for consultants and engineering services, including traffic studies, and for all legal and other technical and expert services, and incidental expenses in connection with the projects herein authorized."

The language quoted above from the Acts authorizing the various highway bond issues makes it clear that the General Court intended that all expenses for engineering services, including traffic studies, and other technical and expert services and incidental expenses in connection with the authorized projects should be included in the cost of the work to be paid from the proceeds from the sales of the bonds which were authorized and subsequently issued in accordance with said Acts.

In the third paragraph of the letter of the Chief Engineer of the Department of Public Works of December 4, 1963, addressed to me on this subject it is stated that an IBM Computer System is rented for the exclusive purpose of making engineering computations and that more than 90% of the work being performed by that Computer System is for projects authorized under the various Bond Issues. It was further stated therein that such use of the IBM Computer System makes possible the release of engineers for other professional activities.

It is my opinion that under the provisions of the various Acts cited in the third paragraph hereof, authorizing the issuance and sale of bonds to implement the accelerated highway program, the Department of Public Works may purchase, rent or lease equipment for the performance of the engineering services, including traffic studies, and other technical and expert services in connection with the projects authorized and financed by said statutes.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The decision of the Commissioner of Veterans' Services is binding and in full force and effect concerning the issues involved subject only to an appeal of the decision or determination to the Governor and Council as provided by statute.*

JAN. 6, 1964.

HON. CHARLES N. COLLATOS, *Commissioner of Veterans' Services.*

DEAR COMMISSIONER COLLATOS: — I have your request relative to the dispute between the cities of Brockton and Quincy on the subject of William H. G. Elder, VB #71767.

You have set forth therein numerous facts which led you to determine that the veteran involved retained his Quincy settlement.

Chapter 115, § 2 provides:

"He (the Commissioner) shall decide all controversies between towns relative to the settlement of applicants for veterans' benefits, and, subject to the approval of the attorney general, his decisions shall be final. He shall decide all controversies between any applicant and a veterans' agent relative to the validity or amount of a claim for such benefits, and, upon the complaint of any person that the city or town in which such person resides is granting such benefits contrary to the provisions of this chapter, shall forthwith make an investigation of such complaint, and a determination of the amount of such benefits, if any, to be granted. *A final appeal from such decision or determination may be taken by such claimant, veterans' agent or resident, within ten days after his receipt of notice of the same, to the governor and council.* The committee of the council to which any such appeal is referred shall, if requested, hold a public hearing thereon and make a report of its recommendations in writing to the governor and council. . . ." (Emphasis supplied.)

It is clear from a reading of this provision that the approval of the Attorney General required thereunder does not relate to factual matters nor to a determination of the policy of your department. The approval of the Attorney General relates only to the form and legal sufficiency of your factual determination.

The legislative enactment providing for an appeal to the Governor and Council by a person aggrieved of your decision is an exclusive remedy and must be followed.

Accordingly, it is my opinion that your decision is binding and in full force and effect concerning the issues involved subject only to an appeal of your decision or determination to the Governor and Council as provided by the statute cited.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*Under the providing statutes the Wachusett Mountain State Reservation Commission does not have the right to enter into a lease.*

JAN. 6, 1964.

CHARLES B. CAMPBELL, *Chairman, Wachusett Mountain State Reservation Commission.*

DEAR MR. CAMPBELL: — I have received your letter of November 15, 1963 relative to the Wachusett Mountain State Reservation ski area authorized by St. 1960, c. 679. You have indicated that you wish to lease the ski facilities for operation by private parties, and have posed five questions with regard to such an arrangement.

I will not treat with your specific questions herein because I find no authorization for the Commission to enter into this type of leasing arrangement. Chapter 679 of the Acts of 1960 provides that the Commission is "authorized and directed to construct, maintain, operate or lease on Wachusett mountain, a ski area with facilities appurtenant thereto". In the absence of language in the act to the contrary, this reference to a lease refers to the right of the Commission to acquire facilities by lease, and does not imply that the Commission may itself lease the facilities to others.

Chapter 679 clearly sets forth the way in which the business of the ski area is to be managed. Section 3 authorizes the Commission to charge reasonable fees for use of the facilities, and directs what disposition is to be made of income that exceeds expenses. Section 4 provides that where expenses exceed funds derived from use of the facilities, the necessary funds shall be assessed and collected as are county taxes. Under § 5, the County Treasurer holds all sums raised by taxation for the ski area, as well as all other sums given or bequeathed for that purpose. A leasing arrangement which would relieve the Commission of these problems of income and expenses is clearly not contemplated. Leasing of the facilities to private parties would make the careful provisions of c. 679 unnecessary, and should not be considered without specific authorization.

Furthermore, when the General Court has felt it desirable to permit a leasing arrangement it has said so. Chapter 755 of the Acts of 1957 authorizes the Commission to lease certain land in the State Reservation. Had the Legislature envisaged leasing of the ski facilities, it could have provided for it in the same manner. I am aware of the fact that other States do permit the leasing of State ski areas, and that such is frequently most practical from a business point of view. However, absent specific authorization by statute, I must advise you that the Commission does not have the right to enter into the proposed lease.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*Warrants for probation violators were not intended to be affected by c. 277 § 72A.*

JAN. 9, 1964.

HON. GEORGE F. McGRATH, *Commissioner of Correction.*

DEAR COMMISSIONER McGRATH: — I have received your letter of December 3, 1963 in which you request an interpretation of Mass. G.L., c. 277, § 72A, recently added by c. 486 of the Acts of 1963. You have asked whether the new section applies to inmates who have had lodged against them a warrant charging violation of probation, with or without a suspended sentence.

As you point out, the statute refers to untried indictments, informations or complaints.

"The commissioner of correction shall, upon learning that an *untried indictment, information or complaint* is pending in any court in the commonwealth against any prisoner serving a term of imprisonment in a correctional institution of the commonwealth, notify such prisoner in writing thereof, stating its contents, including the court in which it is pending, and that such prisoner has the right to apply, as hereinafter provided, to such court for prompt trial or other disposition thereof.

...

"Any such prisoner shall, within six months after such application is received by the court, be brought into court for trial or other disposition of any such *indictment, information or complaint*, unless the court shall otherwise order." (Emphasis supplied.)

The statute further specifies what information is to be transmitted to the Court by the Commissioner of Correction, and provides for notification to the appropriate District Attorney.

I understand that your Department has treated the statute as inapplicable to warrants for probation violations. In my opinion, this interpretation of the law is entirely justified. The statute expressly applies to indictments, informations and complaints, and presumably is not intended to affect proceedings that are not so categorized. The section would appear to be directed toward disposition of those criminal matters that demand trial on the merits, with consequent findings of guilt or innocence of the accused. Warrants for probation violations do not require such trials; the presiding justice need only determine whether sentence should be imposed (in cases where the probationer has yet to be sentenced) or whether sentence should be enforced (where sentence has been imposed but suspended).

Under warrants for violations of probation the guilt of the accused is no longer an issue. The only question is treatment of the offender. In cases where the offender is already confined, speedy disposition of the warrant is obviously unnecessary. However, pursuant to the new § 72A, prisoners do have the right to have questions of actual guilt or innocence speedily determined.

Consequently, it is my opinion that warrants for probation violations were not intended to be affected by c. 277, § 72A, and that the practice

of the Department of Correction, in so far as it has confined the operation of the statute to untried indictments, informations and complaints, may properly be continued.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The granting of taxicab stands upon public highways is a justified exercise of the power to regulate traffic and the highways in general.*

JAN. 15, 1964.

HON. JAMES F. FITZGERALD, *Commissioner of Public Works*.

DEAR COMMISSIONER FITZGERALD: — I have the request of former Commissioner Ricciardi dated November 19, 1963 relative to the validity of using portions of public highways for taxi stands. The former commissioner enclosed with his request a photostat of a letter from Mr. Arthur W. Marchant directed to the Bureau of Public Roads. Mr. Marchant's letter deals with the propriety of the licensing of taxi stands by municipalities. I will therefore treat the matter solely from the standpoint of the rights of cities and towns to issue such licenses.

The regulation by municipalities of vehicles for hire has been held to be authorized by Mass. G.L., c. 40, § 22, which provides in part as follows:

" . . . a city or town may make ordinances or by-laws . . . for the regulation of carriages and vehicles used therein, with penalties for the violation thereof not exceeding twenty dollars for each offence. . . ."

Under this section, cities and towns are authorized to enact regulations prescribing routes, stands, and movements of all vehicles for hire. The assignment of taxicabs to stands set apart on the public highways is a sensible control of traffic which prevents disorder and danger, and is therefore a reasonable regulation.

"No right of any citizen is impaired by an ordinance which prohibits the parking of vehicles at a place in a public street or highway where such person has no legal title to the land occupied by the street or highway and has no interest in such greater than an easement of travel which is held in common with all citizens." *Commonwealth v. Rice*, 261 Mass. 340, 345 (1927).

Therefore, I find that the granting of taxicab stands upon public highways is a justified exercise of the power to regulate traffic and the highways in general, and should be permitted to continue. Contrary to Mr. Marchant's position, I find in such exercise no element of discrimination in favor of any private interest.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Department of Public Health may with propriety, promulgate appropriate rules and regulations to effect those practices and policies necessary and proper to further the law.*

JAN. 15, 1964.

HON. ALFRED L. FRECHETTE, *Commissioner of Public Health.*

DEAR COMMISSIONER FRECHETTE: — I have received your letter of October 21, 1963 relative to the manufacture and sale of bedding, upholstered furniture and related products. In said letter you requested my opinion

"as to whether or not the process of labeling of bedding and upholstered furniture is for consumer protection in the first instance, and in the orderly regulation of the industry in the second instance. If your answer to the above inquiry is in the affirmative, would it be within the scope of the law to expect a retailer to display the mattress he is selling in such a way, so that the consumer could conveniently examine the label?"

It is my opinion that c. 94, §§ 270 through 277 were enacted for consumer protection and the orderly regulation of the industry.

Chapter 94, §§ 271 and 273, require the licensing of everyone engaged in the manufacture, wholesale, processing, repair, sale, renovation, and sterilization of filling materials or fabrics for bedding or upholstered furniture.

Chapter 94, § 272 requires the labeling of every article of bedding or of upholstered furniture or of any filling material. Said label shall state the contents, whether new or old, its source, relative percentages of different materials, whether sterilized, and the manufacturer's serial number.

Section 272 further provides:

"Such labels shall be fixed in such position that they may be conveniently examined.

"Every person, except the purchaser for his own use, or an inspector in the performance of his duties under this law, who attempts to remove, or does remove, deface, alter, or causes to be removed, the label or any mark or statement placed upon any upholstered furniture or bedding under the provisions of this law shall be guilty of a violation of this law."

You have asked whether or not the practice of placing mattresses adjacent to the headboard and placing beds closely together violates c. 94, § 272, par. 4, which provides:

"All labels required by this law shall be securely attached to the article during the process of manufacture at the factory. Such labels shall be fixed in such position that they may be conveniently examined. . . ."

Chapter 94, § 272 was intended to enable a prospective purchaser to know the contents and quality of what he is buying. The requirement that labels be placed so as to be conveniently examined would obviously preclude the placing of a label in the center portion of one of the surfaces of a mattress, and then placing that side to the bottom.

In enacting this law, the Legislature realized that it could not delineate every factor necessary for the licensing, labeling and inspection of bedding and upholstery materials. It, therefore, granted the Department of Public Health, in numerous parts of the statute, authority to promulgate regulations to implement the law.

Chapter 94, § 272 contains four such explicit references. Paragraph 1 provides:

“ . . . unless such article is plainly labeled as provided in this law, and prescribed by the department.”

Paragraph 2 is of similar import.

Paragraph 4 requires that:

“ . . . Such labels shall be fixed in such position that they may be conveniently examined and shall be in accordance with rules and regulations pertaining to labeling promulgated under authority of this law.”

Paragraph 7 provides:

“The department is hereby authorized to prescribe the wording, form style, size, material, lettering, tolerances, requirements, or any changes on labels in order to carry out the provision of this law.”

Chapter 94, § 274 specifically authorizes the department:

“ . . . to establish and promulgate all rules and regulations, *including those pertaining to labeling* and sterilization, necessary to carry out the provisions of sections two hundred and seventy to two hundred and seventy-six, inclusive. . . .” (Emphasis supplied.)

To remove all doubt concerning the legality of the practice referred to, the Department of Public Health may, with propriety, under the enabling aforementioned sections, promulgate appropriate rules and regulations to effect those practices and policies necessary and proper to further the purpose of the law.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Executive approval is not a condition precedent to inclusion of accounts and demands on the comptroller's warrant.*

JAN. 20, 1964.

JOSEPH ALECKS, *Comptroller, Commission on Administration and Finance*.

DEAR MR. ALECKS: — I have your letter dated December 9, 1963 wherein you refer to thirteen general laws and one special act which require that certain accounts and demands be approved by the Governor and Council. Apparently, under the present practice of the Comptroller's Bureau, these accounts and demands must be submitted for approval by the Governor and Council prior to their inclusion on a warrant. If such approval is given, a warrant for the amount owed is then made up. You have requested my opinion as to whether under any or all of the laws you have specified executive approval is a condition precedent to the inclusion of such accounts and demands on a warrant prepared by the Comptroller.

The duties of the Comptroller with respect to these accounts and demands are specified by Mass. G.L., c. 7, § 13.

“The comptroller shall examine all accounts and demands against the commonwealth excepting those for the salaries of the governor and of the



justices of the supreme judicial court, for the pay rolls of the executive council and members of the general court, and those due on account of the principal or interest of a public debt. . . . The comptroller shall make a certificate specifying the amount due and allowed on each account or demand so examined, the name of the person to whom such amount is payable, and the account to which it is chargeable; and if it appears to him that there are improper charges in said accounts or demands he shall report the same to the governor and council, with a separate certificate therefor. He shall keep copies of all such certificates and transmit the originals to the governor, who, with the advice and consent of the council, may issue his warrant to the state treasurer for the amount therein specified as due."

The Comptroller may also require the submission of affidavits relative to the accounts or charges in question.

The effect of the present requirement is that accounts and demands which must receive executive approval are actually being approved twice. Initial approval is given upon submission of the vouchers to the Governor and Council prior to their inclusion on a warrant. After a warrant is drawn, which warrant contains the Comptroller's certificate described in c. 7, § 13, it must be signed by the Governor. Thus, in effect, the matter in the warrant is approved once again before it is transmitted to the Treasurer as an authorization for payment.

I find nothing in c. 7, § 13, or in any of the statutes specified in your letter, which requires such double approval. The certificate provided for in c. 7, § 13 is not a separate document; it is placed directly upon the warrant itself. Therefore, if the certificate is to be submitted to the Governor and Council, it follows that the warrant on which the certificate is to appear must be in existence. If approval is forthcoming, it is then a simple matter for the Governor to sign the warrant, and for payment to be made.

Nothing indicates that executive approval must precede preparation of the warrant. Such a requirement is not necessary in order to ascertain the validity of the charge since the Comptroller is authorized to require the submission of affidavits. Only delay results from postponing the warrant's preparation. Therefore, it is my opinion that executive approval is not a condition precedent to inclusion of accounts and demands on the Comptroller's warrant.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Land-taking Procedures of the Massachusetts Turnpike Authority.*

JAN. 28, 1964.

WILLIAM S. CALLAHAN, *Chairman, Massachusetts Turnpike Authority.*

Re: Land-Taking Procedures — Massachusetts Turnpike Authority.

DEAR CHAIRMAN CALLAHAN: — The Chief of the Eminent Domain Division of this Department has informed me that representatives of the Massachusetts Turnpike Authority have met with him and a member of his staff in response to my letter to you of December 27, 1963 on the above subject.

As a result of that conference, it has been concluded that certain of the administrative procedures of the present land-taking routine of the

Massachusetts Turnpike Authority appear to be in compliance with existing law. However, at the same conference it became evident that present interpretations by members of the legal staff of the Authority of Sections 6 and 8A of Chapter 79 of the General Laws of the Commonwealth are not consistent with the opinions of this Department. It is my understanding that requests for formal opinions concerning the specific application to the present procedures of the Authority of those sections of Chapter 79 will be forthcoming shortly. The issue in connection with Section 6 of Chapter 79 is the relationship which the language thereof has to the common law of trespass. Clarification of certain specific language of Section 8A appears to be necessary to bring a portion of the land-taking procedures of the Authority into conformity with the law.

Your representatives have informed this Department that it is the practice of the Authority to base all pro tanto payments upon the local assessment of the property by local authorities for real estate tax purposes. When the amounts of pro tanto payments are being established, no recognition apparently is given to the appraisals made on behalf of the Authority to determine fair market value at the time that property is taken by eminent domain. If that information is correct, the Authority must, as the taking agency, determine if the local assessment does in fact equal the fair market value of the property. When it exercises the sovereign power of eminent domain it is not appropriate for the Authority in any administrative acts connected with such a taking and compensation therefor to rely upon the valuation placed upon the same property by another local agency for local tax purposes. It is my opinion that such conduct does not fulfill the requirement set forth in Paragraph (2) of the administrative action set forth in my letter to you of December 27, 1963. In short, pro tanto payments by the Massachusetts Turnpike Authority should be based upon a realistic award of damages determined by accepted appraisal principles. I trust that appropriate administrative action will be taken immediately to make certain that this opinion is reflected in the disposition of all presently-pending and future requests for pro tanto payments by property owners from the Massachusetts Turnpike Authority.

It had been expected by this Department that the requests for opinions concerning the interpretations of Sections 6 and 8A of Chapter 79 referred to above would have been received at a much earlier date. However, in order to expedite the revision of the land-taking procedures of the Massachusetts Turnpike Authority with the existing laws of the Commonwealth, this letter is being written to you in the expectation that appropriate responses will be forthcoming promptly. In that connection, your attention is respectfully invited to the fact that as yet there has been no compliance by your staff with the following sentence in the fifth paragraph on page 2 of my letter of December 27, 1963: "To avoid any misunderstanding, it would be appreciated if you would immediately direct the appropriate member of your staff to forward a list to this office of the property and former owners thereof which will be affected by procedural reform number two because payment has not yet been made in accordance with the law which requires that administrative change."

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*Code 100:906 of the Rules and Regulations of the Group Insurance Comm. does not conform with the intent of the Legislature in adopting section 9 of Chapter 30A.*

JAN. 30, 1964.

THEODORE W. FABISAK, *Chairman, Group Insurance Commission.*

DEAR MR. FABISAK: — In your letter of January 8, 1964, you have asked my opinion as to whether Code 100:906 of the Rules and Regulations of the Group Insurance Commission satisfies the requirements of Chapter 30A, section 9?

Along with your letter you have forwarded to this office a copy of the Rules and Regulations as adopted by the Group Insurance Commission. Code 100:906 appears on page sixty of this publication and is quoted here in the form which it appears there.

Code 100:906 Where an employee challenges the decision of the Commission, he may file an appeal to the Commission for a review in accordance with the Administrative Procedure Act. (c. 30A of G.L.)

Chapter 30A, section 9 of the General Laws provides that "each agency shall adopt regulations governing the procedures prescribed by this chapter". The meaning of this provision is that each administrative tribunal must adopt parliamentary rules for conducting hearings under this chapter. It would, for example, be proper to adopt appropriate rules such as are found in *Roberts' Rules of Order*.

Any rules or regulations must, however, be complete and clear. They may not merely paraphrase the provisions of this chapter. This was clearly pointed out by Mr. Justice Whittemore speaking for the court in *Harris v. Board of Registration in Chiropractic*, 343 Mass. 536 (1962).

The regulations adopted do little more than paraphrase the requirements of G.L., c. 30A, § 11. They appear scarcely adequate to serve the purposes contemplated by the statute. It does not appear, however, that Harris was deprived of any right, or was prejudiced, because of their insignificance. [343 Mass. 536 at 539]

It is the purpose of these rules to supplement but not to conflict with the provisions of Chapter 30A.

By the adoption of the Administrative Procedure Act and the incorporation of this statute into the General Laws of the Commonwealth, the Legislature provided a concrete and knowledgable procedural guide for both agency and litigant to follow. A litigant, however, would be less acquainted with those supplementary rules adopted by an agency in accordance with G.L., c. 30A, § 9. It is only fair that he be apprised of these rules. For this reason the rules must be set down and properly promulgated under section 3 of Chapter 30A.

Once a party has had a hearing before an administrative agency, the appellate procedure to be followed in review of that proceeding is specifically outlined in G.L., c. 30A, § 14. Under the provisions of this section an aggrieved party makes his appeal to the judiciary. Any appellate jurisdiction enjoyed by an administrative agency would be found under the authority of the statute establishing that agency. No agency has been given additional appellate jurisdiction by the adoption of the Administrative Procedure Act.

In light of what has been stated in this opinion, I am sure that the Group Insurance Commission will be able to adopt a set of rules and regulations in accordance with G.L., c. 30A, § 9. For this purpose I am enclosing a copy of some rules which you might consider. As Code 100:906 presently stands, it is my opinion that it does not conform with the intent of the Legislature in adopting section 9 of Chapter 30A.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*A person having a full and complete pardon, having previously been convicted and sentenced for certain felonies is legally entitled to consideration for the position of police officer.*

JAN. 31, 1964.

HON. W. HENRY FINNEGAN, *Director of Civil Service*.

DEAR SIR: — You have asked my opinion as to whether or not the provisions of G.L., c. 41, § 96A, wherein it is provided that, “No person who has been convicted of any felony shall be appointed as a police officer of a city, town or district”, is applicable to the case of one Cornelius J. O’Handley who you state received a full and complete pardon on August 20, 1958, having previously been convicted and sentenced for certain felonies as outlined in your letter.

It is my opinion that the clause to which you refer in Article VIII of the Constitution of Massachusetts, to wit:

“... if the offence is a felony the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted; but no character of pardon, granted by the governor, with advice of the council before conviction, shall avoid the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.” is not applicable in this instance.

An examination of the Constitution of Massachusetts reflects that this additional proviso referred to above was adopted in 1944 and permits the General Court to prescribe the terms and conditions upon which a pardon may be granted by the governor. However, it is obvious that as to the pardon granted to Mr. O’Handley no terms or conditions were imposed by the Legislature in the pardon which Mr. O’Handley received.

It has been held in the case of *Ill. Central Railroad v. Bosworth*, 133 U.S. 83, 103:

“In the opinion of the court in the case of *Ex parte Garland*, 4 Wall. 333, 380, the effect of a pardon is stated as follows, to wit: ‘A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes

the penalties and disabilities, and restores him to all his civil rights; it makes him as it were a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.' " (Emphasis supplied.) Accordingly, it is my opinion that Mr. O'Handley is *legally* entitled to consideration for the position of police officer.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Parole Board does not have the authority to continue under supervision an individual whose original commitment is invalid.*

JAN. 31, 1964.

CORNELIUS J. TWOMEY, *Chairman, Parole Board*.

DEAR SIR: — You have asked my opinion as to whether or not the Parole Board has the authority to continue under supervision the case of one John W. Glynn, whom you state was committed as a sexually dangerous person to the then branch treatment center at Walpole on December 20, 1957, for the crimes of unnatural act and indecent assault and battery. You have further stated that the Parole Board, having received a recommendation by Dr. Leon Shapiro that said person was "sexually dangerous" but not physically dangerous, granted a parole permit on the term sentence from the branch treatment center.

In view of the decision of the Supreme Judicial Court in the case of *Commonwealth v. Page*, 339 Mass. 313, wherein it was held that the commitment of a person to a penal institution was invalid where it appeared that the treatment center had not actually been established, it is my opinion that the original commitment of John W. Glynn is invalid under the reasoning of said decision and that the Parole Board does not have the authority to continue supervision over said John W. Glynn. It necessarily follows that the permit granted by your Board is invalid and, therefore, your Board is powerless to effect the same so as to return the person to a branch treatment center.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

FEB. 3, 1964.

THE RIGHT REVEREND MONSIEUR FRANCIS J. LALLY, *Chairman, Boston Redevelopment Authority*.

DEAR MR. CHAIRMAN: — Enclosed for your information is a copy of a letter recently sent to the Massachusetts Department of Public Works concerning certain aspects of its procedures for the taking of land by eminent domain and outlining the necessary corrective action.

Since this office does not represent the Boston Redevelopment Authority, I have little first-hand knowledge of its administrative procedures. I have been advised, however, that these procedures are similar in some respects to those of the Department of Public Works.

Land takings made by the Boston Redevelopment Authority are, of course, subject to the requirements of Chapter 79 of the General Laws and of the Constitution of the Commonwealth to the same extent as takings made by state agencies. The scale on which the Authority operates is obviously such that any non-compliance with the land-taking laws on its part could work a hardship on a substantial number of people.

It is therefore respectfully requested that you review the procedures of the Authority in terms of the enclosed letter in order to determine whether or not these procedures are in compliance with the law as stated therein. Please have particular attention directed to the following aspects of those land-taking procedures of the Authority:

(1) Are all appraisals and title searches regarding land taken by the Authority completed before the adoption of an order of taking?

(2) Is a realistic award of damages, based upon accepted appraisal principals, made upon the adoption of each order of taking?

(3) Is notice of any taking sent promptly to all owners of the property taken, including all mortgages of record?

(4) Are all administrative preliminaries necessary to the payment of damages completed promptly after the taking to permit the issuance and delivery of damage checks without unreasonable delay?

As stated in the enclosed letter, an affirmative answer to these questions is, in my opinion, the minimal requirement for compliance with the law. To the extent that any of them cannot now be answered in the affirmative, it is my hope that you will immediately direct the commencement of appropriate administrative reform and that all land takings by the Boston Redevelopment Authority be suspended until such reform has been completed.

It would be greatly appreciated if you would furnish me within thirty days of the date of this letter the answers to the questions set out above. At the same time, please advise me of any administrative action taken or to be taken which those answers may indicate to be necessary.

I am certain that you share my desire to assure full protection of the rights of all citizens affected by any action taken by the Boston Redevelopment Authority. To that end I am confident that I can depend on the prompt and wholehearted cooperation of you and your staff.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

FEB. 3, 1964.

ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission*.

Re: Land-Taking Procedures, Metropolitan District Commission.

DEAR SIR: — Your letter of January 27, 1964 on the land-taking procedures of the Metropolitan District Commission was apparently based on a misunderstanding of my previous letter to you on the same subject dated December 27, 1963. The purpose of the earlier letter was to call

your attention to certain violations of law in the land-taking procedures of the Commission so that prompt corrective action could be taken. Your reply appears to omit any reference to action taken or to be taken and denies that any such action is necessary. However, please be assured that serious legal problems do exist in land-taking procedures of the Commission. Denial of their existence appears to serve no useful purpose.

In your letter of January 27, 1964 you wrote: "... that none of the land-taking procedures of the Commission violates the law in any manner". Were that my opinion, of course my letter of December 27, 1963 on this subject would not have been written.

Your letter goes on to state that the Commission must comply with any legislative mandate to make land takings and that "no department can abrogate the dictates of the Legislature." With that opinion I agree. However, if you intended to imply that the measures outlined in my letter of December 27, 1963 are somehow in derogation of any legislative mandate, misunderstanding has again arisen. The Legislature has prescribed certain procedures for the taking of land by eminent domain in Chapter 79 of the General Laws. The opinions expressed in my letter were based on said Chapter 79 and on the Constitution of the Commonwealth as interpreted by our Courts. Far from abrogating any legislative direction the letter of December 27, 1963 was written to assist you in executing that mandate. One of the principle duties of the Department of the Attorney General is to advise on and assure compliance with the laws of the Commonwealth by the departments and agencies of the Commonwealth.

Your letter of January 27, 1964 also suggests that the land-taking procedures of the Commission are not actually as represented in my previous letter. Your attention is respectfully invited to the matters of record in support of my letter of December 27, 1963. An examination of all orders of taking filed by the Commission during 1963 in the Registries of Deeds for Suffolk County and for the Southern District of Middlesex County, involving well over 200 parcels of land, discloses that damages in every case were awarded in the sum of \$1.00. As stated in my letter of December 27, this practice of making nominal awards is, in my opinion, a clear violation of Section 6 of Chapter 79. You wrote on January 27, 1964 that in no instance have the courts indicated that this violates the law. However, the Supreme Judicial Court of the Commonwealth has described it as "... an obvious disregard of the legislative purpose ... to obtain an award of just compensation by fair initial administrative action." (*Newton Girl Scout Council v. Mass. Turnpike Authority*, 335 Mass. 189 at 190, note 2.)

The experience of this Department has also been that the Commission rarely if ever makes its appraisals until after land has been taken. Since an appraisal is essential to a realistic award of damages, it follows that an appraisal must be made before a taking if Section 6 of Chapter 79 is to be observed. Hence, the Commission violates the law whenever it fails to do this. I am mindful of the difficulties involved in appraising takings of temporary and permanent easements noted in your letter. The Legislature has decreed, however, that damages must be awarded upon adoption of an order of taking.

Of the parcels of land described in the orders of taking recorded by the Commission in 1963, the owner is listed as "unknown" in over 15

per cent of the cases. Your statement, "... notices have been sent promptly . . ." in all instances appears to be in error. The root of the trouble, of course, is the fact that the Commission does not make its title searches until after a taking. It is inevitable under such a procedure that the owners of many interests in land taken, particularly mortgagees, will remain undisclosed until well after they should be notified of the taking—even in cases where ownership of the underlying fee is known. Such failure to notify all owners, including all mortgagees of record, is a violation of the plain language of Section 8 of Chapter 79 of the General Laws.

Finally, it has been our experience that long delays in the payment of land damages by the Commission are the rule rather than the exception. This doubtless results from the Commission's failure to make timely appraisals and title searches. I might add that even after completion of the Commission's title searches, many of them have been found to contain serious discrepancies, with the result that damage payments have been delayed still further. The Constitution of the Commonwealth, and perhaps even that of the United States, require reasonably prompt compensation for land taken. It can hardly be denied that the delay in payments by the Commission for land taken is, at least in some cases, unreasonable and therefore in violation of this Constitutional mandate.

Thus, it is clear that the Metropolitan District Commission, though doubtless with the best of intentions, has in fact been violating the law. If you are correct in your belief that no one has questioned the validity of takings so made, perhaps the reason is that the landowner, as a practical matter, has no effective means of doing so. To the extent that this is true it is even more important that the Attorney General invoke such remedies as are available to him to assure compliance with the land-taking laws by all public agencies.

However, the question of a previous challenge of these practices is not relevant. The point is that certain of the Commission's practices do not comply with the law and that something must be done about it. While there are obvious difficulties involved in making the necessary revisions in the Commission's procedures, I trust that these difficulties involved will ultimately be surmounted and compliance with the law obtained. Until this occurs, I must respectfully insist, as I did on December 27, that the Commission make no further takings of land.

In addition, I respectfully renew by request that you advise me at once of the action taken or to be taken to carry out the provisions of this letter and that of December 27, 1963, and that you direct a member of your staff to forward to this office the list of properties and owners referred to on page 2 of my earlier letter. To that end, I suggest that a representative of the Commission arrange an appointment with the Chief of the Eminent Domain Division of this Department to discuss this matter in full. Representatives of the other state agencies have already done that. Those conferences have, I believe, been fruitful in all cases. You may be assured of prompt and full cooperation by this Department.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*



*Work having been done by a contractor in accordance with the instructions of the D.P.W. and there being no negligence, no liability would rest with him. However, if a company was negligent it is responsible for damages suffered as a result.*

FEB. 6, 1964.

JAMES D. FITZGERALD, *Commissioner, Department of Public Works.*

DEAR COMMISSIONER: — You request my opinion, by letter of January 2, 1964, as to who is liable and responsible due to an error made in laying out the control for bridge construction of Robin Hill Road on the Berlin-Hudson-Marlboro project. You state that the bridge was constructed using incorrect lines which were furnished to the contractor from information prepared by a survey party under separate contract. It is estimated that it will cost about \$25,000 to correct this error.

From your communication there seems to be no doubt that the error was committed by the survey party and that there was no apparent negligence on the part of the contractor.

A contractor who adheres to the contract specifications and directions of the engineer is not liable for errors or damages, but rather is entitled to compensation for the cost of correcting the error. See *Campanella & Cardi Construction v. Commonwealth*, 239 Mass. 231. In this case a resident engineer had improperly staked out an area to be excavated. By the time the error was discovered it cost the contractor \$5,000 extra to do additional excavating. The court held that the contractor was entitled to an extra for this work.

"It was a misconstruction of the contract which the contractor on the facts found was bound to accept. . . . The right of an engineer to alter the work does not mean that an interpretation binding on the contractor can be changed with impunity after the contractor has acted on the interpretation supplied." *Campanella*, *Supra*, at p. 236.

In the case of *New England Foundation Co., Inc. v. Commonwealth*, 327 Mass. 587 the Supreme Judicial Court held that a contractor who drove a number of piles at the direction of the engineer of the awarding authority according to an approved, contract-specified formula was entitled to collect as an extra for additional piles ordered by the authority when it discovered that the prescribed formula did not produce the proper result of 20 tons per pile. The court used the following language in its finding:

"The construction of a written instrument to be adopted is the one which appears to be in accord with justice and common sense and the probable intention of the parties. . . . The courts always avoid, if possible, any construction of a contract that is unreasonable or inequitable." *N. E. Foundation*, p. 596.

In the case of *M. DeMatteo Construction Co. v. Commonwealth*, 338 Mass. 568, the court ruled that the contractor was entitled to the cost of repairing a span which fell because of improper design.

"The petitioner was required to follow strictly and without deviation, unless expressly authorized, the plans and specifications submitted to it by the respondent. It was obligated to accept the plans, any redesigns of them, any new plans, and any alterations of existing plans, and to do the work 'under the direction, supervision, and general control of the

respondent's officers'. The petitioner built the viaduct under the direction, supervision, and general control of the respondent in compliance with every requirement set forth in the plans and specifications. It did so skillfully, proficiently, and competently. No lack of skill, inattention, incompetence, or negligence in the performance of the work can be attributed to the petitioner. *The collapse of span 15 was attributable, not to the quality of the work of the petitioner or to the materials furnished by it, but to the instability of the structure due to an error in its design.* There was negligence on the part of the consulting engineers acting on behalf of the respondent. . . ." (Emphasis supplied.)

*M. DeMatteo Construction Co. v. Commonwealth*, 338 Mass. 568, 574.

See also *Benjamin Foster Co. v. Commonwealth*, 318 Mass. 190.

A contractor who, without negligence, followed specifications and directions of the engineer is not liable even to third parties. *Murray Realty Inc. v. Berke Moore Company*, 175 N. E. 2d 366; Opinion of Attorney General to Department of Public Works, dated October 27, 1949.

From the decisions in the above-referred to cases, which are analogous to the question you propose, it is my opinion that the work having been done by the contractor in accordance with the instructions of your department, and there being no negligence on behalf of the contractor in the performance of his work, no liability would rest upon him.

Concerning your second question, whether or not the private survey company should be held liable for the cost due to this error, the same principles apply as discussed above. If the survey company was negligent or actually has committed an error as you state, then it is responsible for any damage suffered or to be suffered by the Commonwealth and should be so notified.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*In light of action of the Legislature a local Housing Authority could not legally accept the provisions of the "Veterans Retirement Law". (G.L. c. 32, §§ 56-60.)*

FEB. 7, 1964.

MR. ROBERT M. DEGREGORIO, *Temporary Chairman, State Housing Board.*

DEAR SIR: — In your letter of January 14, 1964, you have asked my opinion as to whether a local Housing Authority could legally accept the provisions of G.L. c. 32, §§ 56 through 60, more commonly known as the "Veterans Retirement Law". You have further asked my opinion concerning questions raised by a local Housing Authority pertaining to the interpretation of these sections.

By St. 1946, c. 574, § 1 the Legislature enacted a comprehensive "Housing Law" for the purpose of eliminating blighted areas and to provide vitally needed low cost housing. Under this statute, now G.L. c. 121, §§ 261 to 26NN, the administration of this project is shared by the State Housing Board and the local Housing Authorities.

The State Housing Board is an agency of the Commonwealth created by authority of G.L. c. 6, § 64. The local Housing Authorities are formed under the "Housing Law" and are defined in G.L. c. 121, § 26J as "a public body politic and corporate created pursuant to section twenty-six K or corresponding provisions of earlier laws".

The formation of the local Housing Authority is dependent not upon a state agency but is left to the judgment of the local community. In making this determination the cities and towns must appraise their own situation and arrive at a decision which is best suited to their own needs. Once having decided that a local Authority is necessary, appropriate action must be taken by the council and mayor of a city or in a town by the town meeting.

General Laws c. 121, § 26K provides:

"Whenever the city council of a city, with the approval of the mayor, or a town, at an annual meeting or a special town meeting called therefor, determines that a housing authority is needed therein for the purpose of the clearance of sub-standard, decadent or blighted open areas or the provision of housing for families or elderly persons of low income or engaging in a land assembly and redevelopment project, it may by vote provide for the organization of such an authority. On determining the need for a housing authority, the city council or the town shall take into consideration the need for relieving congestion of population, the existence of sub-standard, decadent or blighted open areas or unsanitary or unsafe inhabited dwellings, and the shortage of safe or sanitary dwellings available for families or elderly persons of low income at rentals which they can afford."

The membership of the Authority reflects the legislative intent that the local Housing Authorities be closely allied to the community in which it functions. Four of the members of the Authority must be appointed and can only be removed by the local community. Only one of the members is appointed by the State Board. (G.L. c. 121, §§ 26L, 26M.)

Having selected the members of the local Authority, certain other employees may become necessary for the efficient operation of the local Authority. The local Housing Authority is authorized by statute to employ personnel essential to the needs of the Authority. Where possible, however, the Authority is to make full use of the services available to it in the city or town in which it is located.

General Laws, c. 121, § 26N provides:

"A housing authority shall elect from among its members a chairman and a vice-chairman, and may employ counsel, an executive director who shall be ex-officio secretary of the housing authority, a treasurer who may be a member of the authority and such other officers, agents and employees as it deems necessary or proper, and shall determine their qualifications, duties and compensation, and may delegate to one or more of its members, agents or employees such powers and duties as it deems necessary or proper for the carrying out of any action determined upon by it. So far as practicable, a housing authority shall make use of the services of the agencies, officers and employees of the city or town in which such an authority is organized and such city or town shall, if requested, make available such services."

Once acting in the capacity of a local Housing Authority, the Authority and its employees are, though closely allied with the city or town where located, not agents or employees of that city or town. Nor are they employees of the Commonwealth. They are members or employees of the corporate entity established under G.L. c. 121, § 26K and designated as the local Housing Authority. Any rights which they may enjoy arise from their relationship to the local Housing Authority.

"The statutes establishing housing authorities make it plain that such an authority, although organized by and in each city and town in cooperation with the State, is nevertheless, when organized, a complete corporate entity in itself, distinct from the municipal corporation within whose territory it is set up, and exercising its powers in its own independent right . . . It is an instrumentality of government, but it is also a corporation having the contracting powers of a corporation and suable as such 'in the same manner as a private corporation'." [*Johnson-Foster Company v. D'Amore Construction Co.*, 314 Mass. 416, 419 (1943) followed in *Clinton Housing Authority v. Finance Committee of Clinton*, 329 Mass. 495, 499 (1952).]

Chapter 32, §§ 1 through 28 of the General Laws provide for certain persons a comprehensive contributory retirement system. The coverage of these sections is extended only to those public bodies designated in § 28 and similar to the "Housing Law", only after they have signified their acceptance of these provisions.

Under § 28 of c. 32, Housing authorities are authorized to accept only those benefits included within §§ 1 through 28 of this chapter, and only then after fulfilling certain formal requirements.

General Laws c. 32, § 28 provides:

"(5) (a) Any housing authority established under the provisions of section twenty-six L of chapter one hundred and twenty-one, and any redevelopment authority established under the provisions of section twenty-six QQ of said chapter, may provide retirement benefits for its employees if such authority by a vote duly recorded shall accept sections one to twenty-eight, inclusive, as far as applicable. A duly attested copy of such vote shall be filed by the clerk of the authority, or other person performing like duties, in the office of the commissioner of insurance within thirty days after such vote. The commissioner of insurance shall, within fifteen days after the receipt of such attested copy, issue a certificate to be sent to such clerk or person in such authority, to the effect that such sections shall become operative for the employees of such authority on the first day of January or on the first day of July, whichever first occurs, next following the expiration of three months after the date of such certificate; provided, however, that in the case of a redevelopment authority established in a city or town having a housing authority which has accepted the provisions of sections one to twenty-eight, inclusive, said certificate shall be to the effect that such sections shall become operative for the employees of such redevelopment authority upon the receipt of such certificate. The commissioner shall also notify the county commissioners, the mayor or the board of selectmen, and the retirement board of such county, city or town, as the case may be, within which such authority lies, of the acceptance of such sections by the authority

and of the date as of which such sections will become operative for its employees."

No authorization is given under this section to accept any other provisions of the "Retirement Law". Nor can any such authority be found in those provisions of the "Retirement Law" more familiarly known as the "Veterans Retirement Law".

The "Veterans Retirement Law" is the popular name for §§ 56 through 60 of c. 32. These sections provide certain added benefits for some but not all veterans of the Spanish and World Wars. Those towns, municipalities, and other governmental units empowered to accept the provisions of the "Veterans Retirement Law" are set forth in G.L. c. 32, § 60:

"Sections fifty-six to fifty-nine, inclusive, shall, notwithstanding the provisions of any general or special law relating to retirement allowances, be in effect in any county, city, town or district which accepted them or accepted corresponding provisions of law prior to January first, nineteen hundred and forty-six, by the retiring authority.

"No veteran whose employment first begins after June thirtieth, nineteen hundred and thirty-nine, shall be subject to the provisions of sections fifty-six to fifty-nine, inclusive; nor shall any veteran whose employment first began on or before said June thirtieth be subject to said provisions unless at the time of his retirement the total period of his creditable service is at least equal to twice the time he was not in the employ of the commonwealth or of a county, city, town or district subsequent to the date when his employment by the commonwealth or by a county, city, town or district first began."

In drafting this section the Legislature employed the same technique as that used in drafting G.L. c. 32, § 28. Those authorized to accept the various provisions of the "Retirement Law" are specifically named. Unlike G.L. c. 32, § 28, however, Housing Authorities are not included within G.L. c. 32, § 60 and are not authorized to accept the provisions of the "Veterans Retirement Law". Any purported acceptance of these provisions of the "Retirement Law" by a Housing Authority would be without statutory authority and by necessity a nullity.

Recently the Legislature reviewed the provisions of G.L. c. 32, § 60. By St. 1961, c. 297 the Legislature revised the provisions of this section. This revision, however, did not enlarge the category of those empowered to accept the provisions of the "Veterans Retirement Law". The same categories were maintained. The amendment merely extended the time in which a community already authorized might accept this law.

*St. 1961, c. 297:*

"Notwithstanding the limitation contained in the first paragraph of section sixty of chapter thirty-two of the General Laws, sections fifty-six to fifty-nine, inclusive, of said chapter thirty-two shall be in effect in any county, city, town or district which accepts said sections prior to January first, nineteen hundred and sixty-three, by majority vote of the county commissioners, by the mayor, by majority vote of the selectmen, or by majority vote of the prudential committee, as the case may be."

It cannot be assumed that the Legislature was mistaken in drafting these statutes in this manner. Such an assumption would be without legal basis. On the contrary, the legislative purpose was well planned and succinctly stated in G.L. c. 121, 1 26P.

"A housing authority shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of the Housing Authority Law, including clearing sub-standard, decadent or blighted open areas, engaging in land assembly and redevelopment projects and providing housing for families of low income. . . ."

The local Housing Authorities, its members and employees, are entrusted with the duty of carrying out this purpose. Funds appropriated by the Legislature under this statute are to be used to eliminate sub-standard areas and to provide low cost housing. Any other use of these monies would materially deviate from this purpose.

In light of the action taken by the Legislature, it is my opinion that a local Housing Authority could not legally accept the provisions of the "Veterans Retirement Law" (G.L. c. 32, §§ 56-60). This being the case, any questions of interpretation arising under these sections which have been raised by a local Housing Authority would be inappropriate at this time.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Department of Education may seek information concerning the color of students to the extent the questions relate to education and are relevant to the duties of the Commissioner.*

FEB. 10, 1964.

HONORABLE OWEN B. KIERNAN, *Commissioner of Education*.

DEAR SIR: — You have requested my opinion on certain matters, which I shall set forth and answer seriatim.

1. Under Chapter 72, section 2 of the General Laws of Massachusetts or any other section, may the Department seek information concerning color of students between five and sixteen and all other minors over sixteen who do not meet the requirements for the completion of the sixth grade of public schools of the towns where they reside?

Unlike the Fair Housing and Fair Employment Practices Laws, G. L. c. 151B, §§ 4 (3), 4 (6), the Fair Educational Practices Law, G. L. c. 151C, § 2, does not prohibit the making of a record of the color of a student "in connection with" his enrollment. Section 2 (c) of the Fair Educational Practices Law prescribes only the making of inquiries concerning color of persons "seeking admission". Students in the public school system are not "seeking admission" within the meaning of the statute. A child has a right to an education through high school, and the town has the obligation to furnish such an education. See G. L. c. 71, §§ 1, 4, 6; c. 76, §§ 5-15. Unlike private institutions, the public schools have no discretion in their admission policies. No subtle forms of discrimination in the processing of applications, which § 2 (c) attempts to eliminate, can be effected by the public school through the type of inquiry which question 1 suggests. If, however, such information were used by the Department or School Committee to segregate or discriminate, then such action would be illegal and unconstitutional. See G. L. c. 71, § 5; *Brown v. Board of Education*, 347 U. S. 483.

It then becomes necessary to determine whether the Department or the Commissioner has the power to insist that such information be requested. Section 2 of chapter 72 provides, as follows:

"The school committee of each town shall ascertain and record the names, ages and such other information as may be required by the department of education, of all minors residing therein between five and sixteen, and of all minors over sixteen who do not meet the requirements for the completion of the sixth grade of the public schools of the town where he resides. Whoever, in control of any such minor, withholds information sought by a school committee or its agents under this section or makes a false statement relative thereto, shall be punished by a fine of not more than fifty dollars. Supervisors of attendance, under the direction of the committee and superintendent of schools, shall have charge of the records required by this section, shall be responsible for their completeness and accuracy, and shall receive the cooperation of principals, teachers and supervisory officers in the discharge of their duties hereunder. A card, as prescribed by the department, shall be kept for every child whose name is recorded hereunder. Supervisors of attendance shall compare the names of children enrolled in the public and private schools with the names of those recorded as required herein, and examine carefully into all cases where children of school age are not enrolled in, and attending school, as required by section one of chapter seventy-six.

"The annual school committee report shall set forth the number of children recorded as herein required, classified by ages, together with the number attending public or private schools, and the number not attending school, in any given year.

"The supervisory officers of all private schools shall, within thirty days after the enrolment or registration of any child of compulsory school age, report his name, age and residence to the superintendent of schools of the town where the child resides; and whenever a child withdraws from a private school, such officers shall, within ten days, notify said superintendent."

The primary purposes of section 2 are to provide a means of determining the extent to which there has been compliance with the compulsory school attendance laws, G. L. c. 76, § 1, and to determine the relative percentages of children of customary school age who attend public, private or no schools. Records are kept of all residents within the specified age limits, whether they attend public school, private school or no school. The statute allows the Department latitude to require additional information, but the scope of the Department's power in this regard could not be broader than is the policy of section 2. Accordingly, were the information to be acquired reasonably related to a study of school attendance, within the limits of the policies of section 2, then the Department may properly insist that it be collected and submitted. This might be the case, for example, if information were requested by which the Department could determine the relative degrees of compliance of the various racial groups with the school attendance laws, or by which it could determine the extent to which various groups utilized the public school system, or pursued courses leading to higher education.

Substantially greater latitude to elicit such information is granted the Commissioner under section 3. This section deals with school returns

and reports. Its scope is much greater than is that of section 2. Its purpose is to assist the Commissioner in the performance of his duties "in accordance with section one of chapter sixty-nine", and the Commissioner may require any relevant information to that end. Under that section the Commissioner is charged with the general responsibility to evaluate and collect knowledge of the public and other educational systems, and to promote the best interests of education in the Commonwealth, with both public and private groups:

"The commissioner of education shall have supervision of all educational work supported in whole or in part by the commonwealth. He shall collect and distribute information as to the condition and efficiency of the public schools and other means of popular education and the best methods of instruction; shall suggest improvements in the present system of public schools to the general court; shall visit as often as practicable different parts of the commonwealth for the purpose of arousing and guiding public sentiment in relation to the practical interests of education; shall collect in his office such school books, apparatus, maps and charts as may be desirable; shall receive and arrange in his office the reports and returns of the school committees; and shall receive, preserve or distribute the state documents relative to the public school system. He shall give sufficient notice of and attend such meetings, conferences and conventions of teachers of public schools as may be held under his direction, and meetings of members of school committees and of friends of education generally, and shall collect information relative to the condition of the public schools, the performance of their duties by school committees, and the condition of the towns in regard to teachers, pupils, books, apparatus and methods of education."

The Commissioner has the usual wide latitude of administrative discretion to effectuate these vague, enormously difficult but equally important objectives. Accordingly, to the extent the information requested will be of assistance to the Commissioner in the discharge of his duties, it must be furnished.

2. If the answer is in the affirmative, would the earliest time which this could be accomplished be as of October 1, 1964, with the information to be collected during the first two weeks of said October and with the superintendent of schools transmitting the information to this Department on or before July 31, 1965, as contained in Chapter 72, section 3 of the General Laws?

The information may be requested, subject to the qualification set forth below, at any time prior to July 1, when the forms for the school returns must be furnished under section 1. The Commissioner could not, of course, request the information at such time or under such circumstances that the Superintendent could not comply by July 31, the time at which the returns are due under section 3. The requirement of subsection first of section 3, however, that certain statistics be compiled in the first two weeks of October, does not preclude collection at a later date of the information to which your request refers. The purposes of subsection First and of your request in no sense are parallel or mutually exclusive. Similarly, there is no prohibition in section 2 to the collection of such information at any time during the year when it may be obtained.



3. If this information can be requested immediately or at an earlier date, is there any legal obligation on the part of the school committee to submit said information other than specified in Chapter 72, sections 2 and 3?

I have set forth in the previous answers the circumstances under which the Committee or Superintendent, as the case may be, is obligated to supply such information.

4. If a question on color may be asked, may it be asked of those students who have reached the age of sixteen and have completed the requirements of the sixth grade; and if it may be asked, is there any legal obligation for the local school committees to submit this information?

Questions concerning such persons cannot be requested under section 2, which is expressly limited in applicability. To the extent the questions relate to education and are relevant to the jurisdiction and duties of the Commissioner under section 1 of chapter 69, as set forth above, they may be asked and must be answered.

5. If it is legal to seek information as to color of the students, should the information be acquired by having the students bring home a form to be completed or may it be done by head count by each teacher?

It is the duty of the Superintendent or School Committee to collect the requested information. These agencies would necessarily have substantial discretion to determine the best way to gather the data. I would not presume to express an opinion on how that discretion ought to be exercised. Undoubtedly, the means ultimately selected will depend upon the precise questions submitted. To the extent such information is requested under section 2, persons in control of minors are subject to criminal liability for withholding or giving false information.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*In regards to the boycott of public schools in Massachusetts on February 26, 1964, the absence from school is unlawful, if not excused as a necessary one and it is the responsibility of the local school committee to formulate and enforce programs to effectuate school attendance laws.*

FEB. 10, 1964.

HON. OWEN B. KIERNAN, *Commissioner of Education*.

DEAR SIR: — You have propounded to me the following questions:

“In connection with the proposed boycott of public schools in Massachusetts on February 26, 1964, or any other regularly scheduled school day, I would appreciate being advised on the following questions:

1. Is it lawful for a child to be absent from public school on such a day?

2. If the answer is in the negative, what legal remedies are available to enforce compliance with the statutes?

3. Upon whom does the responsibility rest to enforce such legal remedies?"

The so-called "boycott" to which you refer is a plan by which parents on the day in question will keep their children absent from public schools as a form of protest against alleged injustices in one or more local school systems, and against alleged inadequacy in the methods by which those public officials with jurisdiction to do so have undertaken to remedy the said injustices.

For the purposes of this opinion, I assume that the absentee children to whom the questions relate would otherwise attend school, will remain absent solely for the reasons set forth above, and are between the ages of 7 and 16.

The school attendance laws constitute an important part of a statutory scheme designed to implement and effectuate the principles enunciated in Part 2, Chapter 5, Section 2 of the Constitution, which reads as follows:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolences, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.

The antecedents of this constitutional provision reach back to the earliest days of the Massachusetts Bay Colony. "The colonial act of 1647 required each town containing fifty householders to maintain a school in which the children should be taught to read and write, and each town containing one hundred householders to set up a grammar school, with a master able to instruct youth so far that they might be fitted for the university. . . . Thus they laid the foundation of a system which . . . has always retained its fundamental character and purpose. It provided free education in the elementary branches of learning to the children of every town. . . ." *Jenkins v. Andover*, 103 Mass. 91, 97; see also *Cushing v. Newburyport*, 10 Metc. 508, 511.

The dependence of a free and vital society upon an aware, concerned populace, and the importance of universal education to the creation and maintenance of such a populace, cannot be gainsaid. The fact that universal education was espoused in the Constitution illustrates its importance to the organizers of the constitutional government. By the enactment of section 2, universal education was established as a permanent aspiration of society.

Chapters 76 and 77 are designed to assure that this aspiration be realized. Section 1 of chapter 76 provides in part as follows:

"Every child between seven and sixteen (except children between fourteen and sixteen who meet certain requirements) . . . shall, subject to

section 15, attend a public day school in said town, or some other day school approved by the school committee, during the entire time the public schools are in session . . . but such attendance shall not be required of a child whose physical or mental condition is such as to render attendance inexpedient or impracticable or of a child granted an employment permit by the superintendent of schools when such superintendent determines that the welfare of such child will be better served through the granting of such permit, or of a child who is being otherwise instructed in a manner improved in advance by the superintendent or the school committee. The superintendent, or teachers in so far as authorized by him or by the school committee, may excuse cases of necessary absence for other causes not exceeding seven day sessions or fourteen half day sessions in any period of six months. Absences may also be permitted for religious education at such times as the school committee may establish."

The basic policy which the section clearly and unequivocally sets forth is that all children must attend an approved school for a specified period of time. The Legislature was not content merely to make public educational facilities available to those who might desire to use them. Because of the inextricable relationship between the child's education and his whole social, cultural and intellectual development and of the importance of a sound development to the Commonwealth, then notwithstanding the intimate concern of the parent with the upbringing of his child, even conscientious religious objections to the public school curriculum will not justify the parent's ignoring the mandate of section 1. *Commonwealth v. Rensfrew*, 332 Mass. 492. Similarly, the parent whose child is refused admission to school under section 15 because he has not been vaccinated, cannot defend against a criminal prosecution under section 2 on the basis of religious objections to vaccination. *Commonwealth v. Childs*, 299 Mass. 367; *Commonwealth v. Green*, 268 Mass. 585. The General Court has withdrawn from the parent all discretion to raise his child without a public education or one approved by the school committee.

The exceptions which are set forth in the statute fortify, rather than extenuate, the rigor of this primary policy. Many situations, some foreseeable, but many not, must inevitably arise to cause pupils to be absent from school. Yet the statute sets forth only one cause, physical or mental impairment, which can justify absence as a matter of right, and even when the child is so excused, the parent must take all reasonable steps to correct the condition or provide alternate education.

"No physical or mental condition capable of correction, or rendering the child a fit subject for special instruction at public charge in institutions other than public day schools, shall avail as a defence unless it appears that the defendant has employed all reasonable measures for the correction of the condition and the suitable instruction of the child." G. L. c. 76, § 2.

The supervision and control of all other absences which can be authorized under the statute, is vested in the local school administrators. Thus employment permits may be granted only with the permission of the superintendent; private education must be approved by the superintendent or school committee; and such released time for religious training as is allowable under the statute is nonetheless subject to the approval

of the school committee. The only provision in the statute authorizing absence other than for a specified reason is for "necessary" causes. The local administrators have the jurisdiction to determine both what is a "necessary" absence, and when such an absence ought to be excused.

The statute recognizes that if parents were given the discretion to remove their children from school for reasons deemed by them to be adequate, there could be no uniform policy governing absences. The administrators would lose a great deal of the control over the operations of the schools which they now possess. Ultimately such a system would seriously devitalize the basic statutory policy to which I have referred: that the education of youth does not depend upon the pleasure of the parent, but is required by command of the Commonwealth. Accordingly, the grant of total discretion in the public school officials was deliberately done in order to assure uniformity in policy and administration of the school attendance laws.

The policy of section 1 admits of no construction which would authorize the absences to which you refer, if not excused as a necessary absence by the local authorities. Nor does section 2, which reads in relevant part as follows, provide to the contrary:

"Every person in control of a child described in the preceding section shall cause him to attend school as therein required, and, if he fails so to do for seven days session or fourteen half day sessions within any period of six months, he shall, on complaint by a supervisor of attendance, be punished by a fine of not more than twenty dollars. . . . The Boston juvenile court shall have jurisdiction, concurrent with the municipal court of the city of Boston, of complaints hereunder. Complaints hereunder brought in other district courts shall be heard in the juvenile sessions thereof."

The first part of the sentence defines the duty of the parent. The second only sets forth the circumstances under which the parent will be criminally liable. The criminal law is but one weapon in the legal armory; and is reserved only to punish those whose conduct offends minimal social standards. The General Court simply determined that the person *in loco parentis* (but not the interloper, see section 4) ought not be held criminally responsible for keeping out his child for a short period of time. This does not vitiate his duty to comply with section 1, and his failure to do so is an appropriate subject for inquiry by the supervisor of attendance. See G. L. c. 77, § 13.

Accordingly, it is my considered judgment that the absence to which your question relates is unlawful, if not excused as a necessary absence in the manner specified in section 1.

The final two questions may be answered together. As I mentioned above, the primary responsibility for the formulation of uniform policies under section 1 rests with the local school committee. Indeed, section 1 is merely a part of the whole statutory scheme which vests the school committee with plenary administrative responsibility for the conduct of the local school system. See, e.g., G. L. c. 71, § 37; *Barnard v. Shelburne*, 216 Mass. 19. The administrative and executive functions of section 1 are so inextricably intertwined, that it is not surprising that the General Court explicitly mandated that both be under the jurisdiction of the same agency—the local school committee. After setting forth the substantive provisions referred to above, section 1 continues:

"The school committee of each town will provide for and enforce the school attendance of all children actually residing therein in accordance herewith."

In addition to the administrative powers thereby conferred, chapter 77, section 12 requires the school committee to "appoint, make regulations governing and fix the compensation of one or more supervisors of attendance." The supervisors of attendance must inquire into all cases arising under section 1 of chapter 76, may "apprehend and take to school without a warrant any truants or absentees found wandering in the streets or public places," and may serve process issued by the juvenile or district court which has judicial jurisdiction over all offenses under section 1 of chapter 76. G. L. c. 77, §§ 11, 13.

To the extent that absenteeism is a problem involving the youth or his parent, it deserves to be handled by an agency with substantial flexibility and expertise, which can fashion and enforce a highly individualized remedy. The statute seeks to have these problems treated in the first instance by the school committee, which has the closest, continuing relationship with the problem and the pupils, and then by the juvenile court, and district courts, which have special competence in problems relating to juveniles. G. L. c. 76, § 2; c. 77, § 11. It is, therefore, my considered judgment that the statutes confer upon the school committee the primary power, responsibility, and means by which to formulate and enforce programs to effectuate the school attendance laws.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*An appointing authority would not be compelled to reemploy the same employee if his name is again submitted to fill the same position he had been properly discharged from.*

FEB. 13, 1964.

ALFRED L. FRECHETTE, M.D., *Commissioner of Public Health, Department of Public Health*.

DEAR COMMISSIONER FRECHETTE: — In your letter of January 28, 1964, you have asked my opinion concerning whether an appointing authority after dismissing an employee under G.L. c. 31, § 20D is compelled to reemploy that same employee if his name is again submitted by the Director of the Department of Civil Service to fill the same or a similar position.

The Legislature has specifically provided that there shall be a probationary period of six months before an employee of the Commonwealth becomes a permanent member of the Civil Service.

G.L. c. 31, § 20D

Except as otherwise expressly provided in this chapter or in section thirty-six of chapter forty-eight, no person shall be regarded as holding office or employment until he has been appointed to a permanent position in the official or labor service and has actually performed the duties of the office or position thereof for a probationary period of six months. There shall be no increase in pay or change in duties of any such office

or position during such a period without the approval of the director. If any such increase in pay or change in duties is made during such a period without such approval, the director may cancel and declare void the certification under which the appointment was made, and thereupon the employment of the person so appointed shall cease.

If the conduct or capacity of a person serving a probationary period under an appointment in the official service or labor service, or the character or quality of the work performed by him, is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars where in his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the director. In default of such a notice, the appointment of such person shall become permanent upon the termination of such period.

The purpose of this provision is to provide a period in which the appointing authority shall at the same time send a copy of such notice to the director. In default of such a notice, the appointment of such person shall become permanent upon the termination of such period.

The purpose of this provision is to provide a period in which the appointing authority may observe whether the employee is qualified to perform those duties assigned to him. After demonstrating his competence during this probationary period, the employee then enjoys those privileges and benefits consonant with Civil Service status.

If, however, during the probationary period, the employee performs his duties in an unsatisfactory manner and demonstrates that he lacks the requisite qualifications for the position to which he has been assigned, the appointing authority may discharge him immediately. The appointing authority does not have to follow the procedure outlined in G.L. c. 31, § 43 for the dismissal of a permanent member of the Civil Service.

Section 20D superseded Rule 18 of the civil service rules, which read, "no person appointed in the official or labor division shall be regarded as holding office or employment in the classified public service until he has served a probationary period of six months." This was a valid rule under the statute (G.L. [Ter. Ed.] c. 31, § 3, as amended), and during the period of probation established by it the appointee might be discharged otherwise required by G.L. (Ter. Ed.) c. 31, § 43, as amended. *Scott v. Manager of State Airport, Hanscom Field*, 336 Mass. 372, 375, 376 (1957).

This does not mean that the former appointee's employment relationship as a prospective permanent member of the Civil Service is completely severed. The Civil Service Rules provide that after the employee is discharged during the probationary period, his name may be again placed on the eligible list from which he was originally selected by the appointing authority.

#### Civil Service Rules Rule 10

2. Any person whose appointment has been legally made or authorized from the eligible list under the civil service rules, and whose service has been terminated without fault or delinquency on his part during the probationary period, may, upon his request, made at any time during

which the eligible list from which he was appointed is in existence, have his name restored to the said eligible list for the remainder of the period of the eligibility of the list.

It is conceivable that when the discharged employee is returned to the eligible list, his would be the only name appearing on that list. When the appointing authority makes a new requisition for a list from which to make a new appointment to the vacancy, he would find that the only person appearing on that list was the appointee he had just discharged.

A similar situation would occur when the employee discharged was the only disabled veteran on the list. Under the provisions of G.L. c. 31, § 23 a disabled veteran enjoys preference over any other person appearing on that list.

G.L. c. 31, § 23

The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:

(1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing. . . . A disabled veteran shall be appointed and employed in preference to all other persons, including veterans.

In both these situations the appointing authority would be faced with the possibility of having to reemploy an appointee whom he had found during the prior probationary period to have been unsatisfactory. This would be disruptive of departmental efficiency and morale. Further, it would lead to an intolerable impasse where reappointment would lead to subsequent discharge and reassignment to the eligible list.

It was certainly not the intent of the Legislature to allow the Civil Service Law and Rules to be used to create and perpetuate such an impossible situation. Such would be the case, however, if it were incumbent upon the appointing authority to reemploy an appointee after he had demonstrated his incapacity to do his assigned duties.

It is the purpose of the Civil Service Law and Rules to facilitate the orderly and systematic administration of government. To achieve this purpose the Civil Service provisions must be read as a harmonious whole without giving unmerited emphasis to any one section.

The legislative intent is to be ascertained from the statutes as a whole, giving to every section, clause and word such force and effect as are reasonably practical to the end that, as far as possible, the statute will constitute a consistent and harmonious whole, capable of producing a rational result consonant with common sense and sound judgment. . . . *Haines v. Town Manager of Mansfield*, 320 Mass. 140, 142 (1946).

Only in this way can this purpose be implemented in the daily operations of government.

Having this in mind, it is my opinion that an appointing authority would not, under the circumstances discussed in this opinion, be compelled to reemploy the same employee if his name is again submitted by the Director of the Department of Civil Service to fill the same or a similar position after he had been properly discharged under the provisions of G.L. c. 31, § 20D.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*It is the duty of the Trustees of the Chelsea Soldiers' Home to adopt rules and regulations governing admissions to the home, however, any rule not reasonable or related to services which the Home is equipped to give would be void.*

FEB. 14, 1964.

JOHN L. QUIGLEY, *Commandant, Soldiers' Home.*

DEAR SIR: — You have asked my opinion whether the Trustees of the Soldiers' Home may properly deny admission to a veteran who refuses, because of religious convictions, to consent in advance to blood transfusions in connection with surgery for which he seeks admission.

As a general rule, a veteran who is domiciled in the Commonwealth is entitled to admission to the Soldiers' Home. G. L. c. 115A, § 1. The Trustees do have, however, the power to adopt "reasonable rules and regulations governing . . . admission to" the Home and governing exclusion therefrom of persons for whose ailment or conditions there are not proper facilities at the Home. G. L. c. 115A, § 5.

It may be that the success of a given type of surgery is so dependent on blood transfusions that refusal to consent to the transfusion for all practical purposes deprives the Home of "adequate facilities" to treat the ailment. It may also be that the quality of care which can be given to a veteran who consents to transfusions may be sufficiently superior to that which can be given to one who does not so consent to justify a rule or regulation giving preference in admission to the former. On the other hand, a rule providing that mere refusal of a veteran to sign a consent form, in and of itself, and in all circumstances precludes admission to the Home would be arbitrary and beyond the power of the Trustees to promulgate.

It is my considered opinion that it is the function and duty of the Trustees to adopt rules and regulations, based upon reasonable standards, governing admissions to the Home. The proper discharge of this duty will result in the rendition of the optimum treatment for which the Home was established to those eligible therefor. Any rule or regulation, however, which is not reasonable or related to the dispensation of those medical services which the Home is equipped to give would exceed the rule-making power of the Trustees and accordingly would be void.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*Local school committees are responsible for the assignment and distribution of pupils and it is inappropriate to speculate on legal remedies available against parents, or boycott leaders causing absences under a hypothetical situation.*

FEB. 19, 1964.

HONORABLE OWEN B. KIERNAN, *Commissioner of Education.*

DEAR SIR: — You have propounded four additional questions on the proposed so-called "school boycott", for the definition of which I refer to my opinion to you of February 10, 1964 (hereinafter referred to as



the prior opinion). You will recall that in the prior opinion I expressed the views (a) that pupils' absences from school in order to take part in the school boycott were not authorized, if not excused in the manner specified in G.L. c. 76, § 1; and (b) that the school committee has primary power, responsibility and means by which to formulate and enforce the school attendance laws.

The first question reads as follows:

"Whose responsibility is it to assign and distribute pupils throughout the Boston school system?"

The school committees of the various cities and towns have broad discretionary powers under c. 71, § 37 of the General Laws, to effectuate the purposes of the General Laws relating to public education. See generally, *Dowd v. Dover*, 334 Mass. 23; *Davis v. School Committee of Somerville*, 307 Mass. 354; *Rinaldo v. Dreyer*, 294 Mass. 167; *Carr v. Dighton*, 229 Mass. 304. Under § 37, the School Committee is specifically authorized to "make regulations as to attendance" in the public schools. See also G. L. c. 76, § 5. The assignment of pupils in the various schools throughout the city clearly is essential to the proper functioning of the school system. Over a hundred years ago, the Supreme Judicial Court, through Chief Justice Shaw, held: "The power of general superintendence vests a plenary authority in the committee to arrange, classify, and distribute pupils, in such a manner as they (the school committee) think best adapted to their general proficiency and welfare." *Roberts v. Boston*, 5 Cush. 198, 208. Although there are now limitations on the scope of the committee's discretion which did not exist at the time *Roberts* was decided, see G. L. c. 76, § 5; *Brown v. Board of Education*, 347 U.S. 483, it is my considered judgment that subject to these limitations, the School Committee of the City of Boston is responsible for the assignment and distribution of pupils throughout the Boston School System.

In the next three questions, you ask what legal action, if any, may be taken against children who remain absent from school pursuant to the boycott, their parents who authorize such absences, and the "leaders" of the boycott.

In the prior opinion, I pointed out that the Legislature had vested in the school committee the basic responsibility for formulating and executing policies for the enforcement of the school attendance laws. G.L. c. 76, § 1. The Committee is the agency with the flexibility necessary for the task; and it is the agency with continuing responsibility for the conduct of all phases of the school system. The whole spectrum of administrative remedies, including that which would require the pupil to make up the work which he missed by virtue of his absence, is available to the committee. Heavy reliance, in my judgment, was placed by the General Court, on the resourceful and imaginative exercise of such remedies by the school committee. Pupils who might become distracted on the way to school and are "wandering in the streets or public places" are not to be taken by police to court; they are to be taken by school committee employees to school. G.L. c. 77, § 13. It should be fairly obvious that these employees must be sure that those whom they so apprehend in fact were truant and must be taken to the appropriate school. To be sure, § 11 of c. 77 vests jurisdiction of "offences arising under section one of chapter seventy-six" in the district courts and Boston Juvenile Court. I think it unnecessary for the purposes of this opinion for me to deter-

mine whether an absence pursuant to the boycott would constitute an "offence" within the meaning of § 11 under one or more of the various fact situations which could arise in that context. Resort to the courts against a child ought to be the last resort, after all available administrative remedies have failed. All reported expressions from those public officials who are concerned with the boycott have disclaimed any disposition to institute such court proceedings; and there is no indication that the arsenal of administrative remedies is in any way inadequate to cope with the problem. It would therefore be inappropriate for me to speculate on what legal remedies might be available or utilized against any child in a hypothetical situation.

Under § 2 of c. 76, a person in control of a child is required affirmatively to insure the child's attendance in school. Such a person must do more than merely refrain from encouraging truancy; he must "cause him (the child) to attend school" as required in § 1. Myriad reasons could cause an occasional parental failure to discharge this duty. Administrative remedies can be invoked which would require the pupil to make up the studies which he missed during his absence. The General Court determined that the parent ought not be held criminally liable for an isolated default in the requirements of section 2. Persistent failure to enforce such attendance, however, indicates a serious disregard by the parent of his legal responsibilities, justifying the imposition of criminal sanctions. The General Court determined that there was not such a disregard until the child has missed seven days or fourteen half-day sessions in a six month period. Section 2 of c. 76 provides in part as follows:

"Every person in control of a child described in the preceding section shall cause him to attend school as therein required, and, if he fails so to do for seven days session or fourteen half-day sessions within any period of six months, he shall, on complaint by a supervisor of attendance, be punished by a fine of not more than twenty dollars."

A person who is not in control of such a child should be and is treated separately by our statutes. Such a person has no primary duties comparable to those set forth in § 2. He has no responsibility for the child's development comparable in any way to that of the person in control. The person *in loco parentis*, must accommodate himself for about ten years to a compulsory school year of at least 160 days, in which he has minimal discretion over absences of his child. G.L. c. 71, § 1; c. 76, §§ 1, 2. This fact, as I pointed out in the prior opinion, illustrates the esteem in which education is held in the Commonwealth. The third person is under no comparable compulsion.

Section 4 of c. 76 of the General Laws provides as follows:

"Whoever induces or attempts to induce a minor to absent himself unlawfully from school, or unlawfully employs him or harbors a minor who, while school is in session, is absent unlawfully therefrom, shall be punished by a fine of not more than fifty dollars."

It could be argued that § 2 punishes only parental failures of diligence; and that § 4, which proscribes the affirmative act of inducement, applies as well to parents as to others. The word "induce", however, is not appropriate to describe the actions of a parent toward his child. Further, the prohibitions against attempting to induce, harboring and employing, all in § 4, indicates that that section was designed to deal with others

than the persons in control of the child. Accordingly, although the answer is not free from doubt and will not be so until the Supreme Judicial Court considers the question, it is my considered judgment that § 2 contains the exclusive criminal remedies against the parents for violations of § 1.

I have but briefly directed your attention to some applicable statutes, and have given summary attention to the principles upon which they rest. Because of the possibility that private citizens may rely upon this opinion as a basis of action — a possibility indicated by your reference to the fact that your request was prompted by a like request to you by interested citizens — I think it important to set forth some qualifications. No dogmatic or categorical answer can be given to the question of what legal action may be taken against those to whom you refer. A complete answer would require an analysis of all possible fact situations, and of the applicability thereof to all civil and criminal actions. Factors for consideration would vary widely from case to case. An analysis of the availability of advance injunctive relief, for example, would be almost completely different from one of the availability of the criminal law after the fact.

The words “induces” and “harbors” are not mathematically precise. No definition could be devised to answer simply and mechanically all the problems which might arise in litigations under § 4. The attempt to invoke § 4 of c. 76 against persons who might have talked directly to pupils would raise problems different from those which would be raised if the communications were not direct, but were by means of mass communication; and these problems would be different from those which would be raised if the communication was directed only to the parents. Whether the “leaders” of the boycott to whom your question relates include those who advocate a “boycott” in principle but do not participate in its organization or execution is unclear; and whether such persons, to the extent in its organization or execution is unclear; and whether such persons, to the extent they do not advocate positive action, are “inducers”, and if so, whether they are protected by the doctrine of *Yates v. United States*, 354 U.S. 298, could only be determined on a particular set of facts. Similarly, the applicability of the recently enunciated doctrines in *Peterson v. Greenville*, 373 U.S. 244, and *Shuttlesworth v. Birmingham*, 373 U.S. 262, as defenses to any civil or criminal action could be determined only upon an established set of facts.

Illustrations could be multiplied *ad infinitum*. Suffice it to say that the law is life; and all the subtleties and nuances of life are necessary to give content to the general principles of behavior prescribed or proscribed by the statute. Without a recitation of the particular facts of each case, any attempt to predict how such facts might be developed and what a court might decide on the basis thereof would inevitably be incomplete and misleading.

I think it is important to clarify one further point. Both §§ 2 and 4 of c. 76 describe misdemeanors. The maximum penalty under § 2 is \$20., and under § 4, \$50. G.L. c. 274, § 1. Neither section provides that violators may be arrested without a warrant. Under long and established Massachusetts law, in the absence of specific statutory authority, a peace officer may not arrest without warrant one who has committed a misdemeanor except for a misdemeanor involving a breach of the peace

committed in the presence of the officer. E.g., *Muniz v. Mehlman*, 327 Mass. 353. Accordingly, if no breach of the peace were being committed in his presence, a peace officer could not arrest without a warrant. Further, since the penalties for violation of both §§ 2 and 4 are fines only, the justice may issue a summons instead of a warrant if there is reason to believe the defendant will appear on the summons. G.L. c. 276, § 24.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

By EDWARD T. MARTIN,  
*Deputy Attorney General*.

COMMISSIONER JAMES D. FITZGERALD, *Department of Public Works*.

Re: *Riparian Rights, Northampton L.O. 5160*

MARCH 6, 1964.

DEAR COMMISSIONER FITZGERALD: — There has been brought to my attention a letter dated December 11, 1963 from your predecessor Jack P. Ricciardi. There is no indication on that letter that it had been received or processed in accordance with the routine of this Department. Apparently the unusual method of delivery and receipt of the letter resulted in it being misplaced. In any event, attached hereto is a photo copy of that letter.

It is to be noted that the letter of your predecessor asks my opinion on the following questions:

1. Is the Department of Public Works liable for damages to persons from whom no land was taken by eminent domain but who are affected by the construction of an equalizing culvert for the Oxbow?

2. Should the question of the loss of use of the waters of the Oxbow by remaining land be taken into consideration in appraising damages for partial takings of land along the perimeter of the Oxbow?

The courts of the Commonwealth of Massachusetts have declined to recognize the existence of any private rights in the public domain and have denied compensation for impairment of access resulting from the erection of a public work in the bed of a public stream. *Thayer v. New Bedford Railroad*, 125 Mass. 253; *Home for Aged Women v. Commonwealth of Massachusetts*, 202 Mass. 422; *U.S. Gypsum Co. v. Mystic River Bridge Authority*, 329 Mass. 130. The right of access to public waters is limited to access in front of upland to which that right is appurtenant. In states such as Massachusetts where public rights are paramount if the Legislature authorizes construction across the stream, riparian owners who are cut off from the outside world have no redress. *Davidson v. B & M Railroad*, 3 Cash 91; *Blackwell v. Old Colony Railroad*, 122 Mass. 1; *Thayer v. New Bedford Railroad*, op cit.

In the recent case of *Michaelson v. Silver Beach Improvement Association, Inc.*, 342 Mass. 251, the Supreme Judicial Court stated in footnote number one at page 350: “. . . nothing here is meant to impair the established principle that an interference with free navigation affecting the public as well as a particular littoral owner does not entitle the

littoral owner to any individual damages because he suffers from it only as one of the general public, for his suffering is the same in kind as that of the public, although greater in degree by reason of proximity of his property."

It is my opinion that the Department of Public Works is not liable for damages to persons from whom no land was taken by eminent domain but who are affected by the construction of an equalizing culvert for the Oxbow.

It has been recognized that the Legislature is not limited to providing compensation for damages to property which an owner is entitled to receive as a matter of Constitutional right. It may extend compensation to situations where the use of the power of eminent domain results in a real hardship to the owner of property if he were deprived of compensation. *U.S. Gypsum v. Mystic River Bridge Authority*, op cit; *Burr v. Leicester*, 121 Mass. 241; *Watuppa Reservoir Company v. Fall River*, 134 Mass. 267.

Section 7 of Chapter 81 of the General Laws of the Commonwealth provides that an owner of real estate injured by the laying out or alteration of a state highway may receive compensation for damages from the Commonwealth under the provisions of Chapter 79 of the General Laws. Section 12 of said Chapter 79 provides in part: ". . . in case only part of a parcel of land is taken there shall be included damages for all injury to the part not taken caused by the taking or by the public improvement for which the taking is made. . ." It is well settled in Massachusetts that when a part of an entire parcel is taken evidence may be introduced of expenses accruing from adapting the petitioner's remaining land to the condition in which it was left by the taking. That evidence is admissible *not* as a particular item of damage but as evidence tending to show the difference between the market values before and after the taking. *Valentino v. Commonwealth*, 329 Mass. 367.

It is my opinion that the loss of use of the waters of the Oxbow by remaining land should be taken into consideration in appraising damages for partial takings of land along the perimeter of the Oxbow.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

By: EDWARD T. MARTIN

*Deputy Attorney General*

*Interest on damages arising from takings made under chapter 79 and on refunds thereof is payable at the rate of 6% per year only in cases where the order of taking was adopted on or after November 6, 1963, prior to November 6, 1963 interest shall be at 4% per year.*

MARCH 9, 1964.

JAMES D. FITZGERALD, *Commissioner, Department of Public Works*.

Re: *Eminent Domain — Rate of Interest on Damage Awards*.

DEAR SIR: — By letter dated March 6, 1964, you have requested my opinion on the effect of the amendments to Sections 37 and 8A of Chapter 79 of the General Laws contained in Chapter 793 of the Acts of 1963,

whereby the rate of interest payable on damages arising from takings by eminent domain and on refunds thereof was increased from four to six per cent per year. You have directed my attention specifically to the question of whether or not such damages and refunds subject to a four per cent interest rate prior to November 6, 1963, are affected by these amendments.

Section 3 of said Chapter 793 provides:

"Notwithstanding any provisions to the contrary of section thirty-seven of chapter seventy-nine of the General Laws as amended by section one of this act or of section eight A of said chapter seventy-nine as amended by section two of this act the provisions of said sections thirty-seven and eight A in effect immediately prior to the effective date of this act shall remain in effect with respect to interest on damages or on refunds thereof by reason of takings made prior to said effective date."

It is clear from this language that the increased rate of interest does not apply to damages or to refunds thereof "by reason of takings made prior to" the effective date of the Chapter 793. Chapter 793 contains an emergency preamble. It was approved by the Governor on November 6, 1963, and became effective on that date.

There remains the question of when a "taking" occurs for purposes of Section 3 of Chapter 793. It is my opinion that the word "taking" as used in Chapter 793 means adoption of the order of taking. The word "taking" is used in this sense elsewhere in Chapter 79. Section 1 of said Chapter 79 begins:

"The *taking* of real estate or of any interest therein by right of eminent domain may be effected in the following manner." (Emphasis added.) This sentence is followed by a description of how an order of taking is adopted. No reference is made in Section 1 of said Chapter 79 to recording, vesting of title or any of the other steps which follow adoption of the order. It is my opinion that under the provisions of Section 1 of Chapter 79 of the General Laws a "taking" is accomplished by the adoption of an order of taking.

Section 7 of Chapter 79 of the General Laws of the Commonwealth refers to "the date when the taking is recorded". There is a distinction between "taking" and "recording" which designates them clearly as two separate and consecutive acts.

It is my opinion that for the purposes of Chapter 793 of the Acts of 1963 Chapter 79 of the General Laws in Section 1 and 7 establishes that a "taking" is accomplished by the adoption of the order of taking.

It is my opinion that interest on damages arising from takings made under Chapter 79 and on refunds thereof is payable at the rate of six per cent per year only in cases where the order of taking was adopted on or after November 6, 1963, and that interest in cases where the order of taking was adopted prior to November 6, 1963, shall accrue and be computed at the rate of four per cent per annum.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Funds made available to municipalities under § 5 of C. 822 of the Acts of 1963 can be used for the erection of traffic lights on any road.*

MARCH 19, 1964.

COMMISSIONER JAMES D. FITZGERALD, *Department of Public Works.*

Re: *Chapter 822, Acts of 1963.*

DEAR COMMISSIONER FITZGERALD: — In a letter dated March 2, 1964, you requested my opinion on the following question:

“Can funds available under Chapter 822 of the Acts of 1963 be used for the erection of traffic lights on non-Chapter 90 roads under Sections 1 and 5 of Chapter 822?”

Basic to the consideration of this question is Section 4 of Amendment LXII to the Massachusetts Constitution.

“Borrowed money shall not be expended for any other purpose than that for which it was borrowed or for the reduction or discharge of the principal of the loan.”

Sections 1 and 5 of Chapter 822 of the Acts of 1963 are those which are pertinent to the opinion sought by your letter.

Said Section 1 lists the projects covered by the Act: “. . . layout, construction, reconstruction, resurfacing, relocation or improvement of highways, parkways, bridges, grade crossing eliminations and alterations of crossings other than grade, and for construction of needed improvements on other through routes not designated as state highways and without acceptance by the Commonwealth of responsibility for maintenance; provided, that any portion of the sum authorized herein may be used in conjunction with county, city or town funds, and for traffic safety devices on state highways, parkways and on roads constructed under the provisions of section thirty-four of chapter ninety of the General Laws, and for traffic studies.”

The language of Section 1 defines the projects which the Department may perform as a contracting party or in conjunction with the funds of the municipalities. Section 4 of Amendment LXII to the Massachusetts Constitution limits the uses to only those which are specifically authorized in said Section 1. The absence of words indicating that the Department of Public Works may use bond issue funds for the purpose in your question is a vital omission and renders illegal its contracting for the erection of traffic lights on non-Chapter 90 roads.

Section 5 of Chapter 822 of the Acts of 1963 authorizes the apportionment of funds among the several cities and towns. It also limits the uses to which the municipalities may apply those sums. It does not lend to any extension or enlargement of the projects, mentioned in Section 1, which might be undertaken by the Department of Public Works as the contracting agency. In stating, “The sums received by each city and town hereunder shall be used only . . . for the erection or maintenance of traffic lights . . .” said Section 5 indicates permission for a particular use in clear, unambiguous words. Such language authorizes the municipality to expend apportioned funds for the erection or maintenance of traffic lights on non-Chapter 90 roads.

It has been argued that Chapter 247 of the Acts of 1963, which amended Chapter 782 of the Acts of 1962 extended and enlarged the enumerated projects of Section 1 of that act. Careful study and analysis force the

conclusion that Chapter 247 of the Acts of 1963 merely added two specific uses to which the *municipalities* might apply apportioned sums under Section 782. It had no reference to Section 1 of said Chapter 782 of the Acts of 1963. In that legislation the General Court removed all remaining doubt concerning payment for the erection of traffic lights on non-Chapter 90 roads by placing such activity among the permissive uses of apportioned funds by the municipalities.

It is my opinion that funds made available to municipalities under Section 5 of Chapter 822 of the Acts of 1963 can be used for the erection of traffic lights on any road.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Rule 2 of the Rulings Interpretative of the Fair Employment Practice Law is proper in so far as it relates to age, but is otherwise unlawful.*

MARCH 18, 1964.

MR. WALTER H. NOLAN, *Executive Secretary, Massachusetts Commission*.

DEAR SIR: — You have requested my opinion of the legality of Ruling No. 2 of the Rulings Interpretative of the Fair Employment Practice Law, which provides as follows:

“Inquiries, answers to which would directly or indirectly disclose a person’s race, color, religious creed, national origin, age or ancestry, are designated as unlawful practices when such inquiries are made PRIOR to employment unless based upon a bona fide occupational qualification. No restriction is placed on inquiries made AFTER employment provided the information obtained is not used for purposes of discrimination.”

The Commission is authorized by G. L. c. 151B, §§ 2, 3 (5) to promulgate regulations which effectuate the policies of the chapter. The answer to your request depends upon whether Ruling No. 2 does effectuate any such policy.

The Fair Practices Laws consider the problem of inquiries in four places. In three of these, relating to fair practices in bonding and insurance, housing and education, inquiries into certain matters are prohibited only when asked of applicants. It is, accordingly, unlawful:

“For any person engaged in the insurance or bonding business, or his agent, to make any inquiry or record of any person seeking a bond or surety bond conditioned upon the faithful performance of his duties or to use any form of application, in connection with the furnishing of such bond, which seeks information relative to the race, color, religious creed, national origin or ancestry of the person to be bonded.” G. L. c. 151B, § 4 (3A):

for a person covered by the fair housing practices law:

“to cause to be made any written or oral inquiry or record concerning the race, creed, color, national origin or national ancestry of the person seeking to rent or lease or buy any such accommodation or land . . . .” G. L. c. 151B, § 4 (7); see also *id.* § 4 (6):  
or for an educational institution:



"To cause to be made any written or oral inquiry concerning the race, religion, color or national origin of a person seeking admission . . . ." G. L. c. 151C, § 2 (c).

The Fair Employment Practice Law, however, contains broader language. It is an unfair employment practice:

"For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religious creed, national origin, age or ancestry, or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, age, or ancestry, unless based upon a bona fide occupational qualification." G. L. c. 151B, § 4 (3).

The use of the language, "in connection with employment" rather than "in connection with the furnishing . . ." or "seeking . . ." which are used in the other quoted sections cannot be assumed to have been accidental. It must be remembered that an inquiry of the type proscribed need not necessarily be discriminatory. Indeed, there are circumstances under which dynamic social progress requires that records be made which distinguish between various racial or religious groups or the like, and there must be inquiries to achieve this goal. The legislative prohibition on inquiries and records must reflect determinations that such inquiries themselves often evoke consciousness of difference for reasons which the statute's basic policy opposes; and that the dangers that those whose propensities are discriminatory would utilize information derived from the inquiries or records to work discrimination in ways too subtle easily to detect exceed any good which might on occasion result. It is perfectly within the legislative province to determine that the relative importance of the factors will vary among the several areas of human activity which are covered by the Fair Practice Laws. In my considered judgment, § 4 (3) is based upon a finding, which seems credible in the light of human experience, that the employer-employee relationship, as opposed to those others to which the statutes relate, is such that the inquiries or record-keeping described in § 4 (3), at any time create excessive dangers and ought to be proscribed.

Records concerning age are treated separately by the statutes. Sections 24A-24J of c. 149 are not repealed by c. 151B. G. L. c. 151B, § 9. Section 24D of c. 149 requires employers to keep "records of the ages of all persons employed by him." Reading together G. L. c. 151B, § 4 (3) and G. L. c. 149, § 24D, the employer is prohibited by § 4 (3) from making inquiries or keeping records of the ages of applicants; but must keep such records of actual employees.

For the foregoing reasons, it is my considered judgment that Rule 2 is a proper rule in so far as it relates to age; but is otherwise unlawful.

Very truly yours,

EDWARD W. BROOKE

*Under the law of eminent domain the Mass. Turnpike Authority has the power to enter upon private property for the purpose of making appraisals prior to the taking the practice of the Mass. Turnpike Authority in making pro-tonto offers does not violate the law.*

MARCH 19, 1964.

WILLIAM F. CALLAHAN, *Chairman, Massachusetts Turnpike Authority.*

Re: Land-Taking Procedures — Massachusetts Turnpike Authority.

DEAR SIR: — You have requested my opinion on two questions of law relating to the procedures followed by the Massachusetts Turnpike Authority in its exercise of the power of eminent domain:

*Question 1:* "In the absence of permission being granted by the owner of premises, does this Authority have the right to enter upon privately owned land and to enter into privately owned homes, buildings and other structures for the purpose of making appraisals prior to the time that such land, homes, buildings or structures have been taken by this Authority under the law of eminent domain?"

*Question 2:* "In situations where one or more owners, but less than all owners listed in an order of taking, request pro tanto payments, does the practice of this Authority in making pro tanto offers to all the owners listed in such order of taking violate any provision of law?"

Any right of the Authority to enter privately owned land and buildings is to be found, if at all, in Chapter 354 of the Acts of 1952, creating the Massachusetts Turnpike Authority (Hereinafter referred to as the Turnpike Act). Section 7 of the Turnpike Act, as amended by Chapter 384 of the Acts of 1958, confers various powers on the Authority. The following fourth paragraph of Section 7 is pertinent to the first question you have raised:

"In addition to the foregoing powers the Authority and its authorized agents and employees may enter upon any lands, waters and premises in the Commonwealth for the purpose of making surveys, soundings, drillings and examinations as they may deem necessary or convenient for the purposes of this act, and such entry shall not be deemed a trespass, nor shall an entry for such purposes be deemed an entry under any condemnation proceedings which may be then pending. The Authority shall make reimbursement for any actual damage resulting to such lands, waters and premises as a result of such activities."

It is clear from that provision that representatives of the Authority have a right to "enter upon any lands, waters and premises in the Commonwealth" for the described purposes. It is evident that privately owned property is subject to that right of entry from the inclusion of the paragraph in the statute and particularly from the clause declaring that "such entry shall not be deemed a trespass."

The acts permitted upon land so entered include the making of "surveys, soundings, drillings and examinations." The second sentence of the paragraph requiring reimbursement for damages makes it clear that such acts are permitted even where they cause "actual damage" to the property.

An appraisal is essentially an *examination*. It may at times involve *surveys, soundings and drillings* as well. It is difficult, if not impossible,

to conceive of an appraisal requiring any act to be performed on the land to be taken which does not fall within one or more of those terms.

Agents and employees of the Authority therefore have the right to enter private property for the purpose of making appraisals "as they may deem necessary or convenient for the purposes of this act." The "act" referred to, of course, is the Turnpike Act. Section 5(k) thereof authorizes the Authority to acquire property "by the exercise of the power of eminent domain in accordance with the provisions of chapter seventy-nine of the General Laws." An appraisal is a customary condition precedent to awarding compensation for property taken under Chapter 79. Such an appraisal of land to be taken or damaged by a taking is "necessary or convenient" to the performance of one of the lawful functions of the Authority.

By the express terms of the statute representatives of the Authority may therefore enter privately owned "lands" for the purposes of making appraisals.

You have also requested my opinion as to whether or not they may enter "privately owned homes, buildings and other structures" for the purpose of making appraisals.

The authority of a public agency to enter a dwelling house without the consent of the owner for any purpose is an extraordinary power. It may not be lightly inferred. Section 7 of the Turnpike Act names three categories of real estate upon which such an entry may be made: "lands, waters and premises." That language indicates that the word "premises" refers to something other than mere land. The intended meaning of the word "premises" as used in Section 7 of the Turnpike Act must therefore be determined.

While the Turnpike Act itself sheds no light on this definition except to establish a distinction between "premises" and "lands", other Massachusetts statutes are pertinent and helpful. Chapter 165 of the General Laws in Sections 10-11D, confers a right upon employees of water companies to enter "premises" for purposes of reading, testing and removing water meters. There are no reported cases construing the word as used in these Sections. However, it is a matter of common knowledge that water meters are almost invariably located inside buildings. The right conferred by those sections would therefore be virtually nonexistent unless homes and other buildings were included within the meaning of the word "premises."

On a number of occasions the Supreme Judicial Court has reached a similar conclusion about the meaning of the word "premises" as used in a variety of other statutes. In *Doherty's Case*, 294 Mass. 363, 366, the Court interpreted "premises" as referring to "lands or buildings" for the purposes of Section 18 of Chapter 152 of the General Laws relating to the location of injuries covered by workmen's compensation. In *Attorney General v. J. P. Cox Advertising Agency*, 298 Mass. 383, the Court assumed the same meaning for the word as used in Section 30 of Chapter 93 of the General Laws regulating the use of outdoor advertising. In *DePrizio v. F. W. Woolworth Co.*, 291 Mass. 143, 146-147, the Court held that liability under Section 21 of Chapter 84 of the General Laws for injury due to snow and ice on "premises" applied to "both land and buildings" and "to all snow and ice made the basis of action, whether inside or outside the building."

Still more conclusive evidence of the intended meaning of the word "premises" in the Turnpike Act is found in statutes conferring a similar right of entry upon other agencies. The Department of Public Works is given such a right by Section 7F of Chapter 81 of the General Laws as are County Commissioners by Section 11A of Chapter 82 of the General Laws. In both statutes representatives of the agency are authorized to perform acts similar to those enumerated in Section 7 of the Turnpike Act. The right of entry in both applies to "lands, waters and premises." It is most significant, however, that in those statutes the word "premises" is immediately followed by the phrase, "not including buildings." The conclusion is inescapable that the word "premises" as used in those analogous statutes would have included buildings but for the specific exemption thereof. The absence of such an exemption in the fourth paragraph of Section 7 of the Turnpike Act must therefore be interpreted as an expression of a legislative intent to include homes and other buildings within the scope of the word "premises."

For the foregoing reasons it is my opinion that the answer to the first question you have asked is in the affirmative.

### *Opinion on Question 2.*

Payments pro tanto in eminent domain proceedings are governed by Section 8A of Chapter 79 of the General Laws. That Section provides in part as follows:

"A board of officers who have made a taking under this chapter may at any time after the right to damages for such taking has become vested, and if so requested by a person entitled to damages at any time after the right to damages has become vested, shall before the expiration of nine months after the right to damages vested or, in the case of a request made more than three months after the right to damages vested, before the expiration of six months after such request, offer in writing to every person entitled to damages on account of such taking a reasonable amount which such board is willing to pay either in settlement under section thirty-nine of all damages for such taking, with interest thereon and taxable costs, if any, or as a payment pro tanto which may be accepted and collected forthwith without prejudice to or waiver or surrender of any right to claim a larger sum by proceeding before an appropriate tribunal, but subject to the obligation imposed by this section to refund an amount equal to the difference between such payment and the damages subsequently assessed by such tribunal if such offer is accepted as a payment pro tanto and such payment shall prove to be in excess of the damages subsequently assessed by such tribunal. At the election of the person accepting such offer, acceptance thereof may be either in settlement as aforesaid or such payment pro tanto . . ."

As indicated above said Section 8A provides that the Authority "may at any time after the right to damages . . . has become vested . . . offer in writing to every person entitled to damages . . . a reasonable amount . . . in settlement . . . or as a payment pro tanto. . . ." This gives the Authority broad power to make an offer pro tanto to every owner injured by a taking, whether or not that owner or any other owner has requested such an offer. Only two conditions must be met for the exercise of this power.

The first of these conditions is that the right to damages of the owner to whom the offer is made "has become vested". In the case of a taking for highway or highway drainage purposes the right to damages for the taking vests when entry is made thereon. General Laws, Chapter 79, Section 3. To the extent that takings by the Authority are made for these purposes no offer of a payment pro tanto may be made to a former owner until entry. Such entry need not be made upon the specific land taken from a particular owner in order for his right to damages to become vested. It is sufficient that entry be made upon any part of any of the land included within the order of taking covering the land involved in a payment pro tanto. *Mahan v. Town of Rockport*, 287 Mass. 34, 38.

The second condition which must be met by the Authority in order to comply with said Section 8A of Chapter 79 is that the offer be in "a reasonable amount." On the third page of your March 3, 1964 request for this opinion you wrote that the offers of *settlement made* by the Authority have been made "at figures realistically determined, consistent with accepted appraisal principles and practices." Offers so made fully comply with the requirement of "a reasonable amount." Your letter does not indicate, however, whether or not offers of payments pro tanto are made on the same basis.

It is to be noted that the word "either" in the first sentence of said Section 8A of Chapter 79 follows the phrase "a reasonable amount." That language makes the requirement of reasonableness applicable to the offer pro tanto as well as the offer of settlement. The second sentence of said Section 8A confers upon the former owner the right to elect whether the amount offered shall be accepted in settlement or as an award pro tanto. Said Section 8A requires that the Authority shall make an offer in "a reasonable amount," and that the former owner may at his election and without in any way affecting the amount thereof accept it either in settlement or as an award pro tanto.

The legality of the practice of making payments pro tanto to all owners listed in an order of taking upon the request of only one such owner therefor turns on the observance of two requirements: (1) that the right to damages has vested in each such owner, and (2) that each such payment be in "a reasonable amount." Subject to these two requirements it is my opinion that the answer to your second question of March 3, 1964 is in the affirmative.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The sale of advertising space in program books distributed in conjunction with political fund raising functions is not prohibited under Chapter 55, §§ 6 and 7.*

MARCH 21, 1964.

THE HONORABLE FRANCIS X. BELLOTTI, *Lieutenant Governor*.

DEAR MR. BELLOTTI: — I have received your letter of March 6, 1964 relative to the effect of the so-called Corrupt Practices Act on sales of advertising space in program books distributed at political fund-raising functions. You have requested my opinion on the following question:

Is the sale of advertising space in a program book to be distributed in conjunction with a fund-raising function, which sale would be separate and distinct from the sale of admission tickets to said affair, a violation of General Laws, Chapter 55, §§ 6 and 7?

Massachusetts General Laws, Chapter 55, § 6 regulates receipts and disbursements by political committees and political contributions by individuals. The statute provides in part as follows:

A political committee or a person acting under the authority or on behalf of such a committee may receive money or its equivalent, or expend or disburse or promise to expend or disburse the same for the purpose of aiding or promoting the success or defeat of a candidate at a primary or election or a political party or principle in a public election or favoring or opposing the adoption or rejection of a question submitted to the voters, and for other purposes expressly authorized by this chapter subject, however, to the provisions thereof. *Any individual may make campaign contributions to candidates or non-elected political committees organized on behalf of candidates; provided, that the aggregate of all such contributions for the benefit of any one candidate and the non-elected political committees organized on such candidate's behalf shall not exceed in any one calendar year the sum of three thousand dollars —.* (Emphasis supplied.)

The statute further provides that individuals may make additional contributions to elected political committees, non-elected committees organized on behalf of a political party and non-elected committees not organized on behalf of a candidate or political party. Any candidate may of course contribute as he pleases to his own campaign, as well as to non-elected political committees organized on his behalf.

Massachusetts General Laws, Chapter 55, § 7 forbids most corporations from making political contributions, providing in part:

. . . no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. . . .

Corporations shall not be solicited to make such political contributions. The statute provides for the imposition of criminal penalties for violations, as does § 6.

It is clearly § 7 which poses the greatest challenge to the validity of use of an advertising program book at a political fund-raising function, since much, if not all, of such advertising would be purchased by business corporations. There is no decision of the Supreme Judicial Court that is helpful on the subject. Section 1 of Chapter 55 does, however, provide a definition of "campaign contributions" which may be of some assistance. The term "campaign contributions" includes, among other things, all "purchases from a candidate, whether through the device of tickets or otherwise, to the extent that the purchase price exceeds the fair value of the goods sold or services rendered." Apparently, therefore,

candidates and political committees may lawfully accept money or other things of value from corporations in return for providing such corporations with goods or services of equivalent value, including, presumably, advertising.

The only other relevant authority is provided by the taxation field, and supports the conclusion that money paid by a corporation for goods or services is not to be considered a campaign contribution. In *Denise Coal Co.*, 29 T. C. 528 (1957), the Tax Court considered an advertisement placed by a coal company in the program of the 1918 Philadelphia Democratic convention. The Internal Revenue Service claimed that this was in effect a political contribution, since the president of the company was a significant figure in Pennsylvania politics and since the advertisement itself concentrated upon the virtues of the Democratic Party rather than upon those of the coal company. Nevertheless, the Tax Court ruled that the company could properly deduct the cost of the advertisement as an "ordinary and necessary business expense."

Following this decision, the Internal Revenue Service issued Revenue Ruling 56 — 343, which incorporates the holding of the *Denise* case that the cost of advertising in an official political program may lawfully be deducted. Although this Revenue Ruling is by its terms applicable only to national political conventions, the standards therein established are helpful in determining whether money has actually been spent for advertising as distinguished from being handed over as a campaign contribution. Fundamentally, the Ruling demands that the money be spent for business as opposed to political purposes. Value in advertising should be received for the amount of money paid. Admittedly, advertising value is virtually impossible to measure; but at least payments which are grossly disproportionate to the advertising received are eliminated. In addition, the advertising should bear a direct relation to the business being advertised, and should be reasonable in amount considering the size and nature of the business, and its ordinary advertising practices and requirements. Likewise, the opinion in *Denise* suggests two other guidelines. It is helpful if the corporation in question or its agents are not identified with the candidate or his political party; and the advertisement should present the product being advertised rather than the candidate or his party.

In light of the above, the purchase by corporations of advertising in political program books cannot be prohibited under Chapter 55, § 7. This section is a criminal statute; construction of it must be strict, and its effect cannot be extended by implication.

*Peabody v. Campbell*, 286 Mass. 295, 304 (1934).

*Libby v. New York, New Haven and Hartford Railroad*, 273 Mass. 522, 525 (1930).

However, each case must be examined on its facts, and the standards set forth above should serve as guides to determine whether payments by corporations are to be considered as advertising expenses or as campaign contributions.

Section 6 of the Corrupt Practices Act poses no problem if advertising is really being purchased, since individuals may advertise their businesses as readily as corporations. Individuals, however, may of course make

political contributions also, assuming that the monetary limitations imposed by Chapter 55, § 6 are not exceeded.

Consequently, it is my opinion that the sale of advertising space in program books distributed in conjunction with political fund-raising functions is not prohibited under the provisions of Chapter 55, §§ 6 and 7. If the money is truly paid for legitimate advertising, with the purchasers receiving reasonably equivalent advertising value, it is not appropriate to question the wisdom of the purchaser's selection of a political program book as an advertising medium. Such purchases of legitimate advertising cannot be said to be campaign contributions.

Very truly yours,

EDWARD W. BROOKE

*The President of Lowell Technological Institute and his assistant may be employed by the Lowell Institute's Building Authority providing they devote a full work day in their present position.*

MARCH 24, 1964.

HOMER W. BOURGEOIS, *Chairman, Lowell Technological Institute Building Authority*

DEAR MR. BOURGEOIS: — I have received your letter of February 13, 1964 relative to the proposed employment of the President of the Institute and his Assistant by the Lowell Technological Institute Building Authority. You have requested an opinion relative to the legality and propriety of such employment.

The President and his Assistant have served the Authority in the capacities of Secretary-Treasurer and Assistant Secretary-Treasurer. The Authority now desires to retain the services of these individuals at annual stipends for advisory and consulting purposes. The Authority may enter such employment agreements pursuant to the provisions of § 4 (k) of c. 557 of the Acts of 1961, as amended by c. 685 of the Acts of 1963:

"In furtherance of the purposes for which it is created, the Authority is hereby authorized and empowered: . . . To employ architects, consulting engineers, attorneys, construction, financial and other experts, superintendents, managers, *and such other employees and agents as may be necessary in its judgment*, and to fix their compensation; provided, that all such expenses shall be payable solely from funds provided under the authority of this act. . . ." (Emphasis supplied.)

You have referred me to G. L. c. 75A, § 12, as amended by St. 1963, c. 801, § 76, which provides in part that, "[t]he president shall be paid a salary of eighteen thousand dollars, and shall devote his full time during business hours to the duties of his office." Presumably, the Assistant to the President is subject to a similar requirement that he devote full time to his duties during business hours. The question arises whether this provision in any way limits the right of the Authority to hire the President and his Assistant under St. 1961, c. 557, § 4 (k).

That part of § 12 of c. 75A which is at issue requires the President to devote full time *during business hours*. Presumably, the term "business hours" refers to an ordinary working day, perhaps from nine in the



morning to five at night. There is no indication that the Legislature wished to restrict the President's activities at other times; had the General Court such a thought in mind, it would have expressed it in the statute. In fact, the very reference to "business hours" implies that the President need not devote all his energies to his statutory duties at other times.

You have advised me that the services to be rendered the Authority by the President and his Assistant are to be performed outside the business hours of the Lowell Technological Institute. If such is the case, I find nothing that would prevent these officers from accepting the employment that has been offered them by the Lowell Technological Institute Building Authority.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Constitutional impedients aside there appears to be nothing in either Chapter 565, nor the Assurances authorizing the Commonwealth to exercise its right of eminent domain to purchase land or easements for the relocation of displaced transmission lines. A utility company may be compensated if it possesses a property right in public land.*

MALCOLM E. GRAF, *Director and Chief Engineer Water Resources Commission*.

MARCH 26 1964.

Re: New Bedford — Fairhaven Hurricane Barrier Project Utility Relocations.

DEAR SIR: — In your letter of March 11, 1964, you requested my opinion on the following questions arising out of the relocation of a utility transmission line:

1) May the Commonwealth purchase an easement for the New Bedford Gas and Edison Light Company in the name of the Town of Fairhaven for relocation of a transmission line?

2) May the Town legally turn this easement over to the New Bedford Gas Company?

3) In the event that the utility company purchases the easement, may the Commonwealth reimburse the company for all its costs incurred in accordance with the project agreement between the Commonwealth and Corps of Engineers?

The answer to the first question is that the Commonwealth may not purchase the easement in question. It appears clear that Chapter 565 of the Acts of 1962 and the Assurances given to the U.S. Army Corps of Engineers dated August 21, 1962 give the Commonwealth the authority to acquire all lands and easements necessary to carry out the project. Constitutional impediments aside there appears to be nothing in either said Chapter 565 nor the Assurances authorizing the Commonwealth to exercise its right of eminent domain to purchase land or easements for the purpose of relocating the transmission lines displaced.

The answer to the first question makes it unnecessary to answer the second question.

For the purposes of answering the third question, it is assumed that the land on which the utility company now has an easement is privately owned. It is further assumed that the existing easement is not merely a license or permit, but creates a property right in the utility company.

Based on the assumptions set forth in the next preceeding paragraph, the answer to the third question is that the Commonwealth may reimburse the utility company for damages arising from the taking of the existing easement. One element of those damages is the cost of relocation of its transmission line. Payment of those damages would be in accordance with the project agreement with the Corps of Engineers. Your attention is respectfully invited to the Opinions of the Attorney General dated July 15, 1954, reaffirmed by the Opinion of the Attorney General dated February 15, 1963, copies of which are attached.

The Opinion of the Attorney General dated July 15, 1954, is concerned with relocation of utility facilities which exist on public lands. The distinction made is that the utility may be compensated if it possesses a property right in the public land but may not be compensated if it possesses only a license or permit. The same reasoning is applicable to the instant case where the utility line is located on private property.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Questions of the Department of Corporations and Taxation relative to their authority on assessment practices by city and town assessors.*

MARCH 27, 1964.

HON. LEO H. DIEHL, *Commissioner of Corporations and Taxation*.

DEAR COMMISSIONER DIEHL: — I have your request of December 23, 1963, wherein you submit five questions relative to your authority on assessment practices by city and town assessors.

The five specific questions are as follows:

"1. Does the Commissioner of Corporations and Taxation have the authority under the General Laws of the Commonwealth to overrule a decision of the board of assessors of a city or town of the Commonwealth with respect to the assessment of an individual parcel of real estate or item of personal property by directing that said board of assessors assess such property at an amount determined by him to be the full and fair cash value of such property in substitution for the amount determined and assessed by said board of assessors upon such property? For example, if a board of assessors assesses a particular residential property at \$5,000 and the Commissioner of Corporations and Taxation determines that the full and fair cash value of such property is \$15,000, does he have the authority to order said board of assessors to assess such property at \$15,000?

"2. Does the Commissioner of Corporations and Taxation have the authority under the General Laws of the Commonwealth to overrule a decision of the board of assessors of a city or town of the Commonwealth with respect to the total valuation of property subject to taxation in such city or town by directing that said board of assessors assess such aggregate property at an amount determined by him to be the full and fair cash

value of such aggregate property in substitution for the amount determined and assessed by said board of assessors upon such aggregate property? For example, if through a comparison and other investigations, the Commissioner of Corporations and Taxation determines that a board of assessors is assessing the aggregate property subject to local taxation of a city or town at 40% of its full and fair cash value, does he have the authority to order said board of assessors to increase all assessments in that city or town two and one-half times?

"3. What mandatory duties are imposed upon the Commissioner of Corporations and Taxation under the General Laws of the Commonwealth where he determines that a board of assessors of any city or town of the Commonwealth is not assessing property subject to local taxation of its full and fair cash value?

"4. What powers does the Commissioner of Corporations and Taxation possess under the General Laws of the Commonwealth and exercisable in his discretion where he determines that a board of assessors of any city or town of the Commonwealth is not assessing property subject to local taxation at its full and fair cash value?

"5. If the Commissioner of Corporations and Taxation has the authority to order or direct a board of assessors to take action in pursuance of his determination, what procedures or remedies are available to him if such board of assessors refuses to comply with such an order or direction?"

In general, the subject of your inquiry was discussed at great length by the Supreme Judicial Court in *Hobart v. Commissioner of Corporations and Taxation*, 311 Mass. 341, 344, where the Court said:

"The respondent assessors are not subordinates of the respondent commissioner in the sense that they are members, either as subordinate officers or employees, of the department of corporations and taxation, which is under the supervision and control of the commissioner. The assessors are not his agents. They are public officers selected by the municipalities of the Commonwealth charged by statute with the performance of certain specified duties, and are not state officers in the ordinary sense of the term. . . . But in the performance of their statutory duties, the assessors act under the direction of the commissioner only so far as the power of direction is conferred upon him by statute."

And again, at page 345, in further discussing the powers of the Commissioner with regard to a letter written to the assessors the Court said:

"At most, the duty of the commissioner with respect to matters referred to in this letter was to 'give his opinion' to assessors upon any question arising under any statute relating to the assessment and collection of taxes'. We assume in favor of the petitioners . . . that the advice given by the commissioner to the assessors by letter was given in pursuance of his duty to 'give his opinion'. In any event the advice so given cannot be regarded as in the nature of a direction to the assessors or anything more than an expression of his opinion upon a matter with respect to which the responsibility for action was on the assessors."

The general powers of the Tax Commissioner are set forth in G. L. c. 58, § 1, wherein he:

1. May visit any town, inspect the work of the assessors, for the purpose of giving such information or require of them such action as will produce uniformity in valuation and assessments.

2. Shall prepare such instructions to the assessors as will guide them in carrying out such purpose.

3. May cause an assessor to be prosecuted for any violation of law relative to assessment of taxes *for which a penalty is imposed*. (Emphasis supplied.)

4. May appear before any court or board sitting for the abatement of taxes.

5. Shall give his opinion upon any question relating to the assessment and collection of taxes.

The Court has held that under this section, requiring the Taxation Commissioner to give his opinion to a city assessor on any question relating to assessment and collection of taxes, the Commissioner's opinion is not an "order" or "adjudication", but it is an exercise of discretion and judgment. *Hobart v. Commissioner of Corporations and Taxation*, 311 Mass. 341. In no way then is this to be interpreted as permitting the Commissioner to substitute his judgment for that of the local assessors. The city and town assessors, in performing their statutory duties, act under the direction of the Commissioner only so far as the power of direction is conferred on the Commissioner by statute.

In addition to the general powers outlined in c. 58, § 1, the Tax Commissioner shall provide the local assessors all the information relating to assessment and valuation that has come into possession of his department and give them any further instruction and supervision as to their duties as is needed to insure uniformity and equalization (§ 3); if the Tax Commissioner finds that property is not valued in accordance with the law and that such failure is due to inadequate methods of valuation, he shall direct the local assessors to adopt proper methods and if there is no compliance with these directions, he shall notify the mayor or selectmen with any recommendations he deems necessary or expedient (§ 4). You, of course, have other specific duties under c. 58 not pertinent to the subject of your inquiry.

The above-cited sections of the statutes and court decisions impel the conclusion that the relationship between the Commissioner and local assessors is one of an advisory or supervisory nature without the power of direction except in certain "limited" situations. The assessors are independent public officials responsible to their respective municipal authorities and are neither subordinate to nor subject to the control of the Commissioner.

The assessors, on the other hand, are subject to certain penalties: Failure to take oath of office (G. L. c. 41, § 29); knowingly fixing an improper valuation (G. L. c. 41, § 10); failure to keep proper valuation books (G. L. c. 59, §§ 46, 96); failure to compile table of aggregates and file same with the Tax Commissioner (G. L. c. 59, §§ 47, 94); failure to report facts as to omitted assessments to the Tax Commissioner (G. L. c. 59, §§ 48, 94); failure to deposit with the Commissioner a statement of the reasons for a diminution in aggregate valuation (G. L. c. 59, §§ 84, 94); and failure to assess certain taxes as required by law (G. L. c. 59, § 93). If the assessors fail to perform their duties under the law, the Tax

Commissioner has authority to replace them. (G. L. c. 41, § 27). In none of these sections is the Commissioner granted the authority to enforce the fair and full cash value requirement of the General Laws. His powers are limited to the area of advice, supervision and administration. He has no right to substitute his judgment for that of the assessors.

In view of the foregoing, my opinion on your five specific questions is as follows:

1. The Tax Commissioner has no authority to overrule a decision of the board of assessors of a city or town with respect to a particular parcel of property, his duty being to see to it that uniformity in methods and procedures in valuation is maintained.

2. For the reasons set forth in the answer to Question #1 above, the Commissioner does not have the authority to overrule a decision of the board of assessors of a city or town with respect to the total valuation of property within that community. However, in respect to the example you have submitted relative to a city or town assessing property in the aggregate at 40% of its full and fair cash value; it is my opinion that you do have the authority, and it is incumbent upon you, to direct the assessors to make the necessary adjustment in aggregate valuation. Upon the failure of the local assessors to follow your directive, you may then make the appropriate recommendation to the mayor or selectmen as provided in § 4 of c. 58 of the General Laws.

3. When the Tax Commissioner determines that the local assessors are not assessing property at its full and fair cash value, and such failure is due to inadequate methods of record keeping concerning valuation or ownership of property, or due to improper use of information furnished them by his (Tax Commissioner's) office under the provisions of G. L. c. 58, he shall notify them to adopt proper methods of valuation and make proper use of information furnished to them. Additionally, you may notify the mayor and/or the selectmen of the given community of such failure.

4. The Tax Commissioner has the power, where he determines that the local assessors are not assessing property at its full and fair cash value, to appear before any local board sitting for the abatement of taxes. He also has the power to give his opinion to the local assessors or request the opinion of the Attorney General on any question arising out of the assessment and collection of taxes.

5. If the local assessors refuse to comply with any directive of the Tax Commissioner, he shall notify the mayor or selectmen of such failure, with any recommendations which he deems expedient and necessary, or cause the local assessors to be prosecuted for any violation for which a penalty is imposed.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The Governor under § 59, c. 30 of the General Laws has the power to suspend the Commissioner of Public Safety only if one or more of the counts of indictment relate to offenses involving the office of Commissioner.*

MARCH 30, 1964.

HIS EXCELLENCY ENDICOTT PEABODY, *Governor of the Commonwealth.*

DEAR GOVERNOR PEABODY: — I have received your letter of March 27, 1964, relative to the effect of G.L. C. 30, § 59, (the so-called Perry Law), upon Commissioner of Public Safety Frank S. Giles. You have requested my opinion on the following questions:

(1) Do I have the power to suspend Commissioner Giles under Sec. 59, Chap. 30 of the General Laws, as amended by Chap. 829 of the Acts of 1963, by reason of the pendency of any one or more of the count contained therein; and if not under said statute, do I alone or with the concurrence of any other body have such power by virtue of any law or statute?

(2) May Commissioner Giles by his sole act take a voluntary leave of absence without pay for any extended period of time, or would such action to be effective require the approval of any other authority, and if so, which authority or authorities?

(3) If your answer to question (1) is in the affirmative, may I exercise such power of suspension while Commissioner Giles is on such voluntary leave of absence?

G. L. C. 30, § 59, as inserted by St. 1962, c. 798, and amended by St. 1963, c. 829, provides in part as follows:

An officer or employee of the Commonwealth, or of any department, board, commission or agency thereof, or of any Authority created by the General Court, may, *during any period such officer or employee is under indictment for misconduct in such office or employment*, if he was appointed by the governor, be suspended by the governor, whether or not such appointment was subject to the advice or consent of the council or, if he was appointed by some other appointing authority, be suspended by such authority. (Emphasis supplied.)

The statute further provides that the suspended official or employee is to receive no salary during the period of his suspension, nor is such period to be included in computations of sick leave, vacation benefits or seniority rights. The appointing authority may fill the vacated position on a temporary basis. If, however, criminal proceedings are terminated without a finding or verdict of guilty, the suspension is automatically removed and the official or employee is entitled to receive all compensation and benefits that have previously been withheld.

The statute deals with misconduct by an appointed official who is employed by the Commonwealth. It is clearly inapplicable to elected officials. Likewise, it is by its terms inapplicable to offenses that have no relation to the office or position held by the indicted individual at the time the criminal acts in question allegedly were committed. The statute specifies misconduct in *such office or employment*, thus indicating it cannot simply be applied indiscriminately to all offenses committed by an individual while he is an official, or employed by the Commonwealth.

Consequently, the provisions of the above quoted Section 59 become applicable for the purpose of suspending the present Commissioner of

Public Safety only if one or more of the counts of the recently returned indictments relate to offenses involving the office of Commissioner. The subject matters of the indictments range in time from 1958 to 1962, before and during Mr. Giles' tenure as Commissioner. Indictments have been returned for violations of law which were committed during Mr. Giles' tenure as Commissioner of Public Safety, (c. 268, § 10) which section declares it to be a criminal offense for members of State departments to have an interest in Commonwealth contracts.

Commission of the acts that have been proscribed by c. 268, § 10 would, in my opinion, constitute misconduct by Mr. Giles while he was Commissioner of Public Safety. Had Mr. Giles not been an official, his interest in the contracts in question would clearly not have been unlawful. The General Court has indicated by enacting c. 268, § 10 that certain behavior by public officials is improper and unlawful. Accordingly, the commission of such acts by an official such as the Commissioner of Public Safety must be considered misconduct involving his office.

Therefore, in answer to your first question, I advise you that you do have the authority to suspend Commissioner Giles pursuant to Section 59 of Chapter 30 of the General Laws.

You have also asked whether Commissioner Giles could, by his sole act, take a voluntary leave of absence without pay — in effect a "voluntary suspension" — for an extended period of time. "Voluntary suspension" has no particular legal significance in relation to Section 59 of Chapter 30. Under Section 59 the determination to suspend or not to suspend lies with the appointing authority, in this instance with you as Governor of the Commonwealth. A voluntary leave of absence without pay would not conclusively change the status of the official here involved. Such a leave of absence is not contemplated by the statute. It is my opinion that you must consider the Commissioner's status within the express framework of the statute here in question. (Chapter 30, Section 59.)

Accordingly, in answer to your second inquiry, I advise you that a voluntary leave of absence has no legal consequence in relation to your authority to suspend the Commissioner, as set forth in my answer to the first question you pose. It is apparent from the above that I need not answer the third question you pose.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*If the Metropolitan District Commission is convinced that work has actually been performed for, or materials furnished to, prior to October 1, 1960, they may properly certify the amounts to be paid despite the fact of nonconformance with competitive bidding laws.*

MARCH 30, 1964.

HON. ROBERT F. MURPHY, *Commissioner, Metropolitan District Commission.*

DEAR COMMISSIONER MURPHY: — I have received your letter of February 7, 1964 relative to the discharging of certain moral obligations of the Commonwealth pursuant to c. 131 of the Resolves of 1962. You have requested my opinion on the following questions:

"1. What is the legal definition and meaning of the words 'discharging certain moral obligations' under the provisions of Chapter 131?"

"2. Should certification follow if the Commission is convinced that there was nonconformance with the competitive bidding laws, even though it is convinced that the work was performed and/or the materials furnished as set forth in the various vouchers?"

Apparently in several cases work has been performed or materials furnished without compliance with relevant competitive bidding statutes. Payment for such work and materials is now sought under the authority of the above-cited Resolve.

Ordinarily, State construction contracts involving one thousand dollars or more are subject to G. L. c. 29, § 8A (as amended), which provides in part:

"No officer having charge of any office, department or undertaking which receives a periodic appropriation from the commonwealth shall award any contract for the construction, reconstruction, alteration, repair or development at public expense of any building, road, bridge or other physical property if the amount involved therein is one thousand dollars or over, unless a notice inviting proposals therefor shall have been posted. . . ."

However, certain contracts have been awarded without competitive bids having been invited; the work agreed upon has been completed, to the benefit of the Commonwealth. So that the contractors could be compensated for services rendered, the General Court enacted c. 131 of the Resolves of 1962.

The Resolve in question, passed "for the purpose of discharging certain moral obligations of the commonwealth", authorizes payment for services rendered prior to October 1, 1960 after certification by the Chairman of the Metropolitan District Commission and examination by the State Auditor.

"RESOLVED, That, for the purpose of discharging certain moral obligations of the commonwealth and subject to appropriation, there shall be allowed and paid out of the state treasury, for services rendered prior to October first, nineteen hundred and sixty, as shown by vouchers or claims on file with the metropolitan district commission, such amounts as may be certified by the chairman of the metropolitan district commission and verified after examination by the state auditor to be the amounts determined to be due for said services, or work performed, or for materials furnished in connection with said work. . . ."

It would be a difficult matter, and unnecessary for purposes of this opinion, to provide a definition of the term "moral obligation" that would be applicable to all situations. As the expression is used in the present case, "moral obligations" would appear to refer to amounts which the Commonwealth should pay in order to avoid unjust enrichment, yet which cannot be recovered by creditors by judicial proceeding.

It is clear that the General Court intended "moral obligations", as it is used in c. 131 of the Resolves of 1962, to refer to the amounts owed contractors for work done despite failure by the Commonwealth to invite competitive bidding upon such projects. The Commonwealth has received value and the contractors have yet to be paid. I am aware that the bidding statute (c. 29, § 8A) has been violated, and that the con-



tractors in question are legally on notice as to limitations upon the power of State agents to contract. However, it is apparent that the Legislature intended this Resolve to cure such defects. Had there been no defects in the contractual arrangements, a special Resolve would not have been necessary to ensure payment to the contractors. Under ordinary circumstances, with no violations of statutory provisions, the money would clearly be owed, and the Commonwealth would be subject to suit. It is the very existence of defects in the arrangements that have made the Resolve necessary to authorize payment for the services and materials that have been provided.

The bidding statute was enacted by the General Court, and presumably may be limited by that body, assuming, of course, that the Legislature does not simply arbitrarily suspend it for the benefit of some and not for others. The Resolve is directed generally to all such obligations incurred prior to October 1, 1960, and so could not be challenged as discriminatory. Consequently, should you be convinced that work has actually been performed for, or materials furnished to, the Metropolitan District Commission prior to the date specified as a cut-off in the Resolve, you may properly certify the amounts to be paid despite the fact of non-conformance with the competitive bidding laws.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Application of G.L., c. 127, § 133 may be continued by the Parole Board in accordance with its customary practice.*

APRIL 2, 1964.

MR. CORNELIUS J. TWOMEY, *Chairman, Parole Board*.

DEAR MR. TWOMEY: — I have your letter of February 27, 1964 relative to the administration by the Parole Board of G.L., c. 127, § 133, which section governs eligibility for parole. You have informed me that the practice of the Parole Board is first to reduce the prisoner's sentence by deducting from the minimum sentence good conduct credits calculated pursuant to c. 127, § 129, and then to declare the prisoner eligible for parole after two-thirds of such reduced minimum sentence has been served. You have requested my opinion as to whether the method employed by the Parole Board to compute parole eligibility is correct.

The granting of parole permits is governed by c. 127, § 133, which reads as follows:

"Parole permits may be granted by the parole board to prisoners subject to its jurisdiction at such times as the board in each case may determine; provided, that no prisoner held under a sentence containing a minimum sentence shall receive a parole permit until he shall have served two thirds of such minimum sentence, but in any event not less than one year, or, if he has two or more sentences to be served otherwise than concurrently, two thirds of the aggregate of the minimum terms of such several sentences, but in any event not less than one year from each such sentence. *Such minimum term shall be computed after allowing for deductions for good conduct as provided in section one hundred and twenty-nine of this chapter.*" (Emphasis supplied.)

The concluding sentence of the statute quoted above is subject to differing and contradictory interpretations, and has resulted in substantial confusion in the areas of parole eligibility. No judicial decisions are available to shed light on the problem. It is provided that the minimum term of a sentence shall be computed after the allowance of the good conduct deductions specified in § 129. The good conduct credits provided for in § 129 are, of course, deducted from maximum rather than from minimum sentences. Should all the requirements of § 129 be followed, the Parole Board would be forced to deduct good conduct credits from maximum sentences, as does the Department of Correction.

However, a contrary construction of the sentence in question is permissible. Reference in § 133 to § 129 may well have been made for the limited purpose of determining the amount of time to be deducted, i.e., upon a sentence of four years or more, twelve and one half days for each month, etc. The requirements of § 129 that the maximum rather than minimum sentence be reduced would, pursuant to such a construction, be inapplicable, and the Parole Board could justifiably deduct good conduct credits from minimum sentences, as has been its practice.

Lacking court decisions which indicate which construction should be adopted, a determination must be made on the basis of legislative intent and with due consideration for practical administration of the parole laws. Because of apparent legislative intent to reduce periods of confinement and to liberalize parole requirements, it is my opinion that the reference to § 129 is made for the purpose of determining the amount of time to be deducted only, and does not carry over the requirement that maximum rather than minimum sentences be reduced. Consequently, although deductions for good conduct must be made from maximum sentences under § 129 when parole is not an issue, such deductions may properly be made from minimum sentences for purposes of parole under § 133.

On January 25, 1955, Governor Christian A. Herter appointed a Committee to Study the Massachusetts Correctional System, informally known as the Wessell Committee. The Committee recommended that parole requirements be liberalized. By § 69 of c. 770 of the Acts of 1955, the General Court added the last sentence to c. 127, § 133, the construction of which is now in question. A comment that appears at page 72 of the Committee's report is relevant:

"Good-time credits are now granted only as deductions from the maximum term for which the prisoner was sentenced. They do not affect the time of parole eligibility.

"Basically, the good-time allowance should be applicable to time spent within the institution. Therefore, it should be utilized to reduce the time of eligibility for parole. It should be credited against the minimum sentence. If thereafter the prisoner continues in the institution, he should continue to receive credit for the good-time allowance, thus having it reduce the maximum term to be served."

Crediting the deductions against the minimum sentence results in reduction of the time that must be served prior to eligibility for parole, which, according to the Wessell Committee, was the purpose of St. 1955, c. 770, § 69. On the other hand, reducing the maximum sentence generally would not enable the prisoner to become eligible for parole at an earlier date,

and the inclusion of good conduct deductions in § 133 would accomplish nothing, a result which should be avoided.

I should point out that irrespective of the time at which a particular prisoner becomes eligible for parole, the actual granting or withholding of a parole permit is a matter that is confided to the discretion of the Parole Board. Chapter 127, § 133 provides that parole permits may be granted "at such time as the board in each case may determine". Therefore, the date at which a prisoner becomes eligible for parole represents merely the earliest time at which such a permit may be issued; the decision whether or not to issue a permit, and at what time, remains to be made by the Parole Board.

Therefore, it is my opinion that the intent of the General Court in enacting the final sentence of c. 127, § 133 was to reduce the amount of time to be served by a prisoner prior to his eligibility for parole, and that, accordingly, the present practice of the Parole Board is correct. To the extent that certain language appearing in the opinion of the Attorney General of January 15, 1964 to the Commissioner of Correction indicates otherwise, such language is hereby withdrawn. The opinion of January 15, 1964 is, however, valid as it pertains to the Department of Correction. Where parole is not an issue, good conduct credits must still be deducted from the maximum sentence. For purposes of parole, however, such good conduct deductions should be made from minimum sentences, and the Parole Board may properly continue to administer c. 127, § 133 in accordance with its customary practice.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*An absolute pardon would serve to eradicate the existence of a crime entirely, and c. 125 § 9, would not bar the appointment of a pardoned applicant to a position involving personal contact with prisoners.*

APRIL 3, 1964.

HON. GEORGE F. McGRATH, *Commissioner of Correction*.

DEAR COMMISSIONER McGRATH: — I have received your letter of February 5, 1964 relative to the effect of an absolute pardon upon individuals with criminal records who seek appointments to certain positions within the Department of Correction. You have requested my opinion as to whether absolute pardons enable such persons to be appointed to positions which involve personal and direct contact with prisoners.

Appointment of persons with criminal records to positions in the Department of Correction is governed by G.L., c. 125, § 9, as amended by St. 1961, c. 90, which provides in part as follows:

"Notwithstanding any provision of law to the contrary, but subject, however, to the provisions of section sixty of chapter one hundred and nineteen, no person who has been convicted of a felony, or who has been confined in any jail or house of correction, shall be appointed to any position in the department of correction the duties of which involve personal and direct contact with prisoners."

The statute admittedly represents a legislative determination that individuals with certain criminal histories (i.e., felony convictions or confine-

ment in a jail or house of correction) generally are not desirable to fill positions which require substantial contact with prisoners.

However, the apparent legislative intent notwithstanding, the granting of an absolute pardon for such felony conviction or for the crime for which the applicant for appointment was confined in a jail or house of correction would eradicate the fact that such crime had ever been committed and would render the above statute inapplicable. Power to pardon most criminal offenses is vested in the Governor by the Constitution of the Commonwealth.

"The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council; *provided, that if the offense is a felony the General Court shall have power to prescribe the terms and conditions upon which a pardon may be granted*: but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned." (Emphasis supplied.)

A full pardon has the effect of eradicating the fact that a crime has ever been committed. For a recent analysis of this problem, I would refer you to the opinion rendered by the Attorney General to the Director of Civil Service on January 31, 1964. The United States Supreme Court has commented that an absolute pardon "blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence."

"In the opinion of the court in the case of *Ex parte Garland*, 4 Wall. 333, 380, the effect of a pardon is stated as follows, to wit: '*A pardon reaches both the punishment prescribed for the offences and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence.* If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him as it were a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.'" (Emphasis supplied.)

*Illinois Central Railroad v. Bosworth*,  
133 U.S. 83, 103

Consequently, since in the eyes of the law the pardoned applicant's crime has never been committed, c. 125, § 9 would not prevent appointment of such an individual. Admittedly, if a felony has been committed, the General Court has the power to prescribe the terms and conditions upon which a pardon therefore may be granted. But the Legislature has not done this. Chapter 125, § 9 is not specifically directed at the pardoning power; it is applicable only to individuals whose offences have not been pardoned, and whose crimes, therefore, are still legally in existence. It is reasonable to assume that had the Legislature intended to limit the constitutional pardoning power of the Governor it would have indicated

that such was its object. Absent such indication, c. 125, § 9 cannot be construed as an exercise by the Legislature of the right to prescribe the terms and conditions upon which a pardon may be granted. Therefore, an absolute pardon would serve to eradicate the existence of a crime entirely, and c. 125, § 9 would not bar the appointment of a pardoned applicant to a position involving personal contact with prisoners.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Commanding Officer of a State Armory may impose such restrictions on the ability to buy and sell liquor in the armory which he deems necessary and proper.*

APRIL 6, 1964.

COLONEL RALPH T. NOONAN, *State Quartermaster, Mass. ARNG.*

DEAR COLONEL NOONAN: — In your letter of March 3, 1964 you have requested my opinion on the following questions:

"May liquor be sold in State Armories by organizations who rent the facilities, under the provisions of Section 122?

"If the ruling is favorable, what form of license should the Military Division request before permitting such sale?"

General Laws c. 138, § 28 provides that one who holds a license under §§ 18 (wholesalers and importers) and 19 (manufacturers) of said chapter may

". . . sell and deliver such beverages to any person on any federal or state military or naval reservation *authorized by the commanding officer thereof to purchase and receive the same.*" (Emphasis supplied.)

The answer to your first question thus depends upon whether an armory is a military or naval reservation. It is my opinion that the resolution of this question depends upon military considerations and definitions and therefore must be made by a military officer, such as yourself. The term "military reservation"

"is a term unknown to the law and means nothing, except that it may have been intended for a fort, magazine, arsenal, camp, post, or other military use."

*United States v. Tichenor*, 12 Fed. 415, 424

In the event that the answer to the above question is in the affirmative, and (a) if the organization is properly qualified (c. 33, § 122) and receives the approval of the commander-in-chief to rent the armory and (b) also receives authorization (pursuant to c. 138, § 28) to purchase liquor by the commanding officer, liquor may then be sold to an organization for consumption within an armory.

Since state armories are state property, and therefore not subject to licensing by municipalities, no license as such would be required by a qualified organization in order to purchase liquor to be sold in an armory. The commanding officer, however, by designating an individual to purchase liquor in behalf of the organization, may impose such restrictions on the ability to buy and sell liquor in the armory which he deems necessary and proper.

Having in mind that the use of state armories is in the first and primary instance a military consideration, and with further emphasis on the provisions of § 28 above quoted that the commanding officer must authorize the proposed use, it is my opinion that the commanding officer may authorize such use only when he deems the activity necessary and proper.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Massachusetts Commission Against Discrimination is not required to order every respondent who has been found to have discriminated against a complainant to offer a housing accommodation to such complainant.*

APRIL 17, 1964.

HON. MILDRED H. MAHONEY, *Chairman, Massachusetts Commission Against Discrimination*.

DEAR MADAM: — You have requested my opinion of whether the commission is required to order every respondent who has been found to have discriminated against a complainant in violation of G.L., c. 151B, §§ 4 (6) or 4 (7) to offer a housing accommodation (if available) to such complainant, irrespective of any other circumstances which may exist.

As you know, when society became highly complex, traditional procedures for the development and enforcement of certain legislative policies became inadequate. The administrative agency, of which the commission is an example, evolved to meet the needs thereby created, not only because of its capacity to act swiftly, but also because of its intimate acquaintance with the problems and its institutional capacity to deal with them flexibly. In my opinion to Commissioner Batson dated April 3, 1964, I sought to show that the basic duty of the Commission is to administer the Fair Practices Laws creatively, imaginatively and dynamically.

Surely a most important area for creative development of the law lies in the method for the treatment of violations. The General Court has vested in the commission substantial latitude to select the most appropriate remedy for each particular case. General Laws, c. 151B, § 5 provides in part that if the commission has determined that an unfair practice has been committed, it "shall issue . . . an order requiring such respondent to cease and desist from such unlawful practice . . . and to take such affirmative action . . . as, in the judgment of the commission, will effectuate the purposes of this chapter. . . ." See also G.L., c. 30A, § 14 (8); *Massachusetts Commission Against Discrimination v. Colangelo*, 344 Mass. 387, 398-401.

Frequently, if not generally, the operation of the cease and desist order, without more, will break the unlawful barriers to admission theretofore imposed. Furthermore, in many cases the commission may properly decide that the purposes of the statute will best be served by fashioning a remedy requiring the respondent to offer an accommodation to the complainant. The statutes have not granted to each complainant, however, the unqualified right to receive such a remedy from the commission to redress the respondent's breach of duty done to the complainant. The qualification is that the remedy effectuate the purposes of the law, a de-

cision which the commission must make in each case, in the first instance, and in view of the facts of the particular case.

The incidence of cases in which such a personal remedy will not effectuate the purposes of the Act is, I understand, small. Were this fact to harden into a rule prohibiting the commission from inquiring into matters which, although not relevant to the issue of an unfair practice, directly relate to the commission's duty to fashion a remedy which effectuates the purposes of the act, then the commission could not properly perform its duty. Were it to harden into a rule depriving the commission in any case of its choice of the whole arsenal of remedies which the General Court has authorized, then the flexibility so integral a part of the commission would be impaired. It is, of course, not for me to speculate on what circumstances might cause the commission to grant or withhold such a personal remedy nor even on how the issue might be raised. It is sufficient to note that the area is open for consideration by the commission, and that it may deal with it appropriately.

It is, accordingly, my considered judgment that the commission is not required to order every respondent who has been found to have discriminated against a complainant in violation of G.L., c. 151B, §§ 4(6) and 4(7) to offer a housing accommodation (if available) to such complainant, irrespective of any other circumstances which may exist.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Re: Chapter 90 Highways — Expenditures for Engineers and Consultants.*

APRIL 21, 1964.

JOHN D. WARNER, *Associate Commissioner, Department of Public Works.*

DEAR SIR: — By letter dated March 27, 1964, you requested answers to the following questions:

(1) Is it permissible for cities and towns to hire outside engineers and consultants to perform the survey and layout work, under the supervision of the Department of Public Works, and include the cost as an acceptable expenditure under the Chapter 90 appropriation?

(2) Is it permissible to have the plans of the proposed improvement prepared by outside engineers or consultants, subject to Department approval, and to include the cost as an acceptable expenditure under the Chapter 90 appropriation?

For the purpose of this letter it is assumed that the survey and layout work referred to in the first question and the planning work referred to in the second question would be done in connection with maintaining, repairing, improving and constructing town and county highways.

Chapter 90 of the General Laws in Section 34(a) provides in part:

"The balance [of the Highway Fund] . . . shall be used . . .

"(a) For expenditure, under the direction of said department [of public works], for maintaining, repairing, improving and constructing town and county highways . . ."

"(d) For expenditure, under the direction of said department [of public works], for engineering services and expenses . . . incidental to the purposes specified in subdivisions (a) . . . of this clause;"

It appears that said Chapter 90 in Section 34 (2) (a) and (d) dictates affirmative answers to both of your questions, having in mind that the words, “. . . under the supervision of the Department of Public Works . . .”, as used in the questions, must be considered to have the meaning as the words, “. . . under the directions of said department . . .” as used in Section 34 (2) (a) and (d) in said Chapter 90.

This letter is not intended to express any opinion on whether it is wiser administration to enlarge the appropriate staff in the Department of Public Works rather than to retain outside engineers and consultants to perform the services contemplated herein. If the Commissioners determine the latter to be the better policy it is respectfully recommended that they designate and approve in advance of their employment any and all outside engineers and consultants whom they consider qualified and the rates of their compensation.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

By:

JOHN S. BOTTOMLY,  
Assistant Attorney General  
Chief, Eminent Domain Division.

*Application of Chapter 844 of the Acts of 1963, specifically the term “financial interest.”*

APRIL 22, 1964.

JOSEPH ALECKS, *Comptroller, Commission on Administration and Finance*.

DEAR SIR: — I have received your letter of January 28, 1964 relative to the extent of the application of c. 844 of the Acts of 1963. You have requested a definition of the term “financial interest” as it is used in the statute.

You have provided a proposed definition of “financial interest” as “. . . any person who, in some direct manner, will benefit financially from a given contractual relationship with the Commonwealth”. I believe that in general such a definition will be satisfactory. However, I would point out the problems involved in drafting a definition that is sufficiently all-inclusive that it would be applicable no matter what the factual situation. Therefore, since it is impossible at this time to predict exactly what situation will arise, no definition should be offered which implies that its provisions are never to be varied.

I would advise that the proposed definition be amended to indicate that the meaning of “financial interest” must be flexible depending upon the given factual situation. Because of the practical necessity of judging each case on its own facts, I do not think it wise to address myself to the questions relating to particular individuals and positions raised in paragraph (1) of your letter. A given person may well have a “financial interest” under c. 844 in one situation, and lack such an interest should a different set of facts arise.



In paragraph (2) of your letter you refer to individuals contracting with the Commonwealth for their own benefit rather than in behalf of other parties. Chapter 844 provides:

"No contract to provide consultant services shall be awarded by the commonwealth, or by any department, board, commission or other agency acting in its behalf, unless the person signing such contract *on behalf of the party contracting to provide such services* files with the comptroller a statement. . . ." (Emphasis supplied.)

Clearly, the object of the provision is the identification of parties financially interested in the contract who otherwise might remain anonymous. Consequently, an individual contracting solely in his own behalf would not be affected by this statute. Such a person would still, of course, be required to disclose whatever financial interest his partners might have in the transaction. And where an agreement exists for the payment of an agent's fee or commission in connection with the contract, disclosure of this fact would be necessary.

Chapter 844 limits the term "financial interest", in so far as corporations are concerned, to persons holding more than one per cent of the corporation's capital stock. You have inquired whether the General Court intended this provision to apply to a large corporation with a complex financial structure and stock which may be actively traded in the open market.

The Act in question makes no distinction between large public corporations whose stock is actively traded and smaller corporations with fewer and more easily identifiable shareholders. The statute exempts only those shareholders whose financial interest consists of one per cent or less of the capital stock of the contracting corporation, without regard to the size or complexity of the corporation involved. Despite the fact that supplying names and addresses of shareholders of record will be difficult for a large business, it appears to be the legislative intent that such information must still be provided in order to comply with the requirements of c. 844.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Dept. of Mental Health may take, hold and administer in trust for the Commonwealth grants for the use of persons in state hospitals.*

APRIL 23, 1964.

HARRY C. SOLOMON, M.D., *Commissioner of Mental Health*.

DEAR COMMISSIONER SOLOMON: — I have your request of April 21, 1964 seeking my opinion as to whether the Department of Mental Health is authorized to accept Federal grants.

Chapter 123, § 6 of our General Laws provides:

"The department shall be a corporation for the purpose of taking, holding and administering in trust for the commonwealth any grant, devise, gift or bequest made either to the commonwealth or to it, for the use of persons under its control in any state hospital, or, if the acceptance of such trust is approved by the governor and council, for expenditure upon any work which the department is authorized to undertake."

The statute clearly sets forth that the department may take, hold and administer in trust for the Commonwealth grants for the use of persons in state hospitals.

Should the grant be made for other work, the department is authorized to undertake acceptance of such grant which must be approved by the Governor and council.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Re: Mass. Comm. Against Discrimination versus Halper — No. Pr. HV-1-5 R-C.*

APRIL 28, 1964.

MR. WALTER H. NOLAN, *Executive Secretary, Massachusetts Commission Against Discrimination*.

DEAR SIR: — The hearing commissioners have requested my opinion of whether the facts of this case disclose a violation by respondent Halper of the Fair Housing Practices Law, G.L., c. 151B, § 4 (7) or of the Public Accommodations Law, G.L., c. 272, §§ 92A, 98. The facts, as found by the hearing commissioners, are set forth in the Appendix to this opinion.

Throughout their long and sometimes uneven history, the Massachusetts fair practices laws have consistently excluded from their reach certain kinds of human activities. The authority of religious institutions to give preference to their own adherents, for example, has not been impaired by such laws. See G.L., c. 272, § 92A; G.L., c. 151B, § 4, G.L., c. 151C, § 1.

The other major type of activity which has been exempt from the coverage of the fair practices acts may be characterized as "private" or "personal." For these purposes, the "private" transaction, in general, is one which is isolated and which does not involve a public offering or solicitation. The "personal" relationship, on the other hand, is one which depends in large measure for its success on the agreeable interplay of the personalities of the actors involved.

The two concepts, although not synonymous, are closely related. The expression which they find in the legislation, not unexpectedly, varies. The original public accommodations law, St. 1865, c. 277, § 1, for example, defines that which is covered so as to exclude what is private or personal:

"No distinction, discrimination or restriction on account of color or race shall be lawful in any licensed inn, in any public place of amusement or public meeting in this Commonwealth."

The same type of limitation maintains today in the fair practices in bonding and mortgage lending acts, which apply only to those "in the business." G.L., c. 151B, §§ 4 (3A), 4 (3B).

Although the public accommodations law has vastly increased its scope in its century-long lifetime, the current statute still applies only to a business "which is open to and accepts or solicits the patronage of the general public. . . ." G.L., c. 272, § 92A. It is significant to note that in addition to this general limitation, the current statute specifically excludes a place "which is owned or operated by a club or institution whose prod-

ucts or facilities or services are available only to its members and their guests." *Ibid.* Such a place, although not meeting the definition of "private" given above, involves those types of "personal" relationships which the Legislature held were not proper subjects for regulation.

In the Fair Educational Practices Law, these exclusionary policies appear to merge. In general, the statute applies to "any institution for instruction or training . . . which accepts applications for admission from the public generally" and thus includes privately financed schools. The statute specifically excepts from the general rule, however, an institution which is "in its nature distinctly private. . . ." G.L., c. 151C, § 1 (b).

The major concern of the Fair Employment Practices Act in this area is naturally with the personal relationship. Thus the principal direction of the law is to the larger, commercial employer.

"The term 'employer' does not include a club exclusively social, or a fraternal, charitable, educational or religious association or corporation, if such club, association or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ. . . ." G.L., c. 151B, § 1 (5).

Similarly, a person "in the domestic service of any person" as well as one employed by his parent, spouse or child, is not classified as an employee. G.L., c. 151B, § 1 (6).

Before analyzing the place of the Fair Housing Practices Law in the context of the laws referred to above, it is appropriate to make some observations on the facts found by the Commission. These facts appear to disclose a contemplated relationship, at least as close as that which exists between master and servant, and probably closer than most or all of those which would not be covered by the other fair practices laws adverted to above. Substantially all the facilities of the respondent's household would, by necessity, be shared. Only one bathroom services all bedrooms. The bedrooms which would be occupied by respondent and his tenant are "back-to-back." A single, common hallway leads from both bedrooms to the other areas of the house. There is one kitchen only to prepare the food to be eaten in a single dining room. There is one living room only. In the most intimate setting of the home, it might well be held that there is, for both landlord and tenant, for all practical purposes, "no place to hide"; that the relationship which the respondent sought to create could not practically be maintained on a "business" basis; that neither party could realistically hope to be able to avoid establishing a personal relationship with the other which would be extraneous and irrelevant to any profit motive or business consideration. Under such conditions, the intimacy of the living quarters themselves may require that landlord and tenant be personally compatible, lest the arrangement be intolerable for both. Yet this intimacy and requirement of personal compatibility is precisely what distinguishes domestic servants from other employees, clubs from business establishments and some small employers from large employers. It therefore becomes necessary to determine whether the Fair Housing Practices Law departs from the other Fair Practices Laws in its treatment of this type of relationship.

Superficially, it would appear that the Fair Housing Practices Laws do not exclude the type of personal relationship which is involved in the *Halper* case. Section 1 (13) of c. 151B limits the types of accommodations covered to those involving a "public offering", and thereby exempts

the private, negotiated sale or lease. This exemption embodies the traditional exclusion for "private" transactions from the fair practices laws. Furthermore, the leasing of an apartment in a two-family house by the owner who resides in the other apartment is specifically exempt from the law under § 7 (C). Thus the Legislature has acted to exclude traditional "personal" type of relationship from the fair housing law. It cannot, therefore, be said that the problem of exclusions was not considered by the General Court. The exemption of § 7 (C) is, in effect, the legislative embodiment of a roughly-hewn rule of thumb by which one common type of problem can be disposed of. It is the fair housing analogy to the exclusion from the fair employment practices laws of employers with less than six employees. There is no specific exclusion, however, written into the housing law, comparable to the "domestic servant" exclusion of the employment law.

It could, therefore, be argued with considerable force that the difference between the two laws was deliberate and that the policy of housing law admits of no exclusions other than those specified. The Fair Housing Practices Law, however, did not emerge fully-bloomed, as a completely integrated statutory scheme. It developed piecemeal. An analysis of the law and of its development, in my considered judgment, discloses that, in this regard, no radical differences in fundamental policy exist between the Fair Housing and the Fair Employment Practices Laws.

If the exemption of § 7 (C) were to preempt the field of exclusions of its type, then it would become itself anomolous. The relationship we are considering here is far more personal than are those described in § 7 (C). Section 7 (C) is a rule — simply definable and mechanically applicable. It is not a statement of policy. Unless it is only a part of an inclusive, if unexpressed policy, it becomes an island, unattained to the principal body of law which the Legislature has announced. There are, of course, many cases in which the Legislature singles out for special treatment only the most obvious or easily recognizable factual situations. This is not generally the case, however, nor ought it be, when enforcement of the law is vested in an administrative agency. Characteristically, laws so enforced are imprecise, simply because the problems likely to arise under them are so unpredictable, and cover a multitude of possible factual situations. Administrative agencies are generally given substantial discretion to develop the broad policies of the statutes under their jurisdiction. The Massachusetts Commission Against Discrimination is no exception to this rule. It would be consistent with the role of the commission under the statute to hold that the exclusion in § 7 (C) is a rule which only covers specifically the most common situation in which the problem arises, but nonetheless does not supersede or vitiate the basic, underlying policy from which it derives. In this way the Commission can administer and develop the policy of the law, in the customary and usual manner of "inclusion and exclusion," as it appears to the multitudes of fact situations which might arise under the law. It would be inconsistent with the role of the commissioner under the statute to require it to enforce the policy of the law in the most common situation to which it relates, but to prevent it from developing this policy in other situations which, although they may arise less frequently, nonetheless involve identical considerations.

The first entry of the Legislature into the specific field of discrimination in housing occurred in 1950, when the commission was vested with

the responsibility to enforce the prohibitions against discrimination or segregation in public housing, St. 1950, §§ 4, 5, amending G.L., c. 221, § 26FF (c). The problem of intimate relations between landlord and tenant was obviously not presented at that time. Nor was it presented in 1957, when the Legislature next acted in the area by subjecting the sales or leasing of publicly assisted housing and multiple dwellings to the provisions of c. 151B. Dwellings with less than three separate units were not considered "multiple dwellings." St. 1957, c. 426, § 1. The problem which is posed in the *Halper* case first became latent in 1954, when contiguously located housing was put into chapter 151B. St. 1957, c. 239, § 1. Such housing included that "which is offered for sale, lease or rental and which at any time was one of ten or more lots of a tract whose plan has been submitted to a planning board as required by the subdivision control law. . . ." *Ibid.* Thus, the regulatory scheme was ostensibly determined by the character of the land, rather than by the nature of the transaction. The statute in terms is not limited to "public offerings" of the type described in § 1 (13). Section 4 (6) of the statute was amended at the same time to apply to those in control of contiguously located housing the same rules against discrimination which had theretofore applied to those in control of multiple dwellings.

It was in this statutory setting that the Supreme Judicial Court considered *Massachusetts Commission Against Discrimination v. Colangelo*, 344 Mass. 387. The Court there, in holding § 4 (6) constitutional as applied to multiple dwellings, observed:

"Section 4, subsection 6, is really aimed at preventing discrimination in the business of housing. . . . The statute is in pattern with anti-discrimination legislation. General Laws c. 272, § 92A . . . and § 93 apply in 'A place of public accommodation, resort or amusement . . . (which) shall be deemed to include any place whether licensed or unlicensed, which is open to and solicits the patronage of the general public.'" 344 Mass. at 398.

Thus the Court considered that the fair housing laws were merely an extension of established legislative policies, although a procrustean application of § 1 (12) would even then have required that tribunal to hold that the Legislature had enacted a significant change in these policies by the inclusion of all strictly private sales of contiguously located housing.

At the legislative committee hearing on the bills, which became G.L., c. 151B, §§ 1 (13) and 7, which hearing was held after the *Colangelo* decision, this office sought to articulate the "place of the proposed legislation in the existing pattern of our fair practices law." We opened our discussion with the following blunt remark:

"The basic purpose of § 350 (enacted as St. 1963, c. 197) is not to legislate new principles of law; nor is it to extend the existing principles into areas not related to those now covered by existing laws. The purpose is to perfect the existing Fair Housing Act by remedying anomalies which have been uncovered by experience and by extending its reach to areas which are not logically distinguishable from it."

During the course of the discussion, we had occasion to analyze these established principles of law.

"The fundamental distinction between that which can be regulated and that which cannot or should not be regulated is not the magnitude of the

transaction involved. The smallest shop as well as the biggest department store is subject to the public accommodations law. Nor is the distinction to be found in the degree of the business involvement between the parties. The twenty-year mortgage, the lease for a term of years and the issuance of performance bonds are no less covered by the Act than is the cash-and-carry, isolated sale. The basic distinction is between the business transaction and the personal transaction, between the public offering and the private offering.

We sought to justify the extension of the law by showing that the types of transactions to be covered would be generally no different from those already covered by their existing legislation.

"A nonresident landlord of a single or two-family dwelling has a relation to his tenant identical in character to that existing between an apartment house owner and his tenants. Similarly, the nature of a sale of a residence does not vary whether it is an isolated sale, or one of many sales. Indeed, in all these cases, the direct contacts between seller and buyer, or landlord and tenant, are generally minimal and often nonexistent. Frequently, the lawyers and brokers or agents handle the entire transaction, and the parties never even meet."

Thus the legislative history shows that no dramatic departures from the policies consistently enunciated by the Legislature, as confirmed by the Court in *Colangelo*, were enacted in the recent housing law. For the foregoing reasons, it is my considered judgment that there is a residue of closely-knit, highly personalized relationships of the type which the fair practices laws have always excluded and which, although not specifically described, are nonetheless not covered by the Fair Housing Practices Law.

Most social and business intercourse is, of course, made more comfortable and fruitful when the actors are friendly. Yet most relationships can exist and continue without personal involvement; whereas others cannot. The human mind is not so gross as to be unable to distinguish between such relationships. It is, however, important that in separating that which can from that which cannot, be so regulated, no categorical imperatives be employed. All the factors of each case must be considered and evaluated.

I have frequently stated that as a matter of basic policy, the Commission ought in the first instance, to set forth its view of whether, applying the policies of the statutes, the facts found do or do not constitute an unfair practice. In this way, the Commonwealth can be assured of the full exercise by the agency of the powers vested in it; and any reviewing court will have the benefits to be derived by a full exploration of the problem by that branch of government most intimately involved with the enforcement of the applicable policies. See, e.g., my opinions to Commissioner Batson and to Chairman Mahoney of recent date. The Legislature has established the policies which I have set forth above. Whatever might be my personal opinion of the significance of the facts and of how they ought to be evaluated, in light of these policies, I defer expressing them at least pending the exhaustion of the administrative proceedings. Accordingly, I can only remand the case back to the Commission for disposition in light of the policies expressed above.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The plumbing in the New State Office Building is subject to the provisions of c. 142, § 21 of our General Laws.*

APRIL 28, 1964.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MRS. SULLIVAN: — I have your letter of April 15, 1964 requesting my opinion on the following:

"Is the new State Office Building, being constructed by the Government Center Commission, subject to the rules and regulations relative to plumbing formulated under authority of Section 21 of Chapter 142, G.L.?"

Section 21 of c. 142 of the General Laws provides:

"The examiners shall formulate rules relative to the construction, alteration, repair and inspection of all plumbing work in buildings owned and used by the commonwealth, subject to the approval of the department of public health, and all plans for plumbing in such buildings shall be subject to the approval of the examiners."

Chapter 635 of the Acts of 1960, which established the Commission authorized to construct the State Office Building, provides in part:

". . . all other general and special laws, or parts thereof, prohibiting, restricting, limiting or regulating the height, bulk, location and use of buildings, and the provisions of the Boston Building Code and of ordinances of the city of Boston shall not be applicable to any building, structure, tunnel or facility constructed under the provisions of this act."

The last quoted provision of c. 635 exempts the buildings, structures, tunnels or facilities constructed by the Commission from general and special laws regulating the height, bulk, location and use of buildings and from the Boston Building Code and City ordinances.

I find nothing in the said c. 635 exempting the State Office Building from the provisions of the General Laws relating to the supervision of plumbing.

In the case of *Boston Elevated Railway Company v. Commonwealth*, 310 Mass. 528, 556, the Court quoted Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, in stating:

"As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

It is clear that had the Legislature intended to exempt the State Office Building from plumbing rules and regulations it could very easily have said so. Nor may such exemption be implied in the above-quoted provisions of c. 635.

Accordingly, it is my opinion that the plumbing in the new State Office Building is subject to the provisions of § 21 of c. 142 of our General Laws.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A National Guard officer may be promoted without interfering with his activity under c. 33, § 18a of the General Laws.*

MAY 1, 1964.

MAJOR GENERAL THOMAS J. DONNELLY, *The Adjutant General*.

DEAR SIR: — I have your letter of March 24, 1964 relative to the status of National Guard officers who have been ordered to active duty in division headquarters under the provisions of G. L. c. 33, § 18 (a), and who become subject to the retirement provisions of the Reserve Officers Personnel Act. I understand from your letter that a particular lieutenant colonel, currently on active duty under the said c. 33, § 18 (a), is about to have his federal recognition withdrawn. You have asked whether any change in the status of this officer, either by promotion or by loss of federal recognition under the provisions of ROPA, would require the termination of his employment.

General Laws c. 33, § 18 (a) authorizes the Adjutant General to order three officers to active duty in division headquarters. Such officers receive pay that is equivalent to that received by regular army officers of corresponding grade and length of service; such pay, however, cannot exceed that received by a colonel, lieutenant colonel and major, respectively. *"To be eligible for duty as aforesaid, such officers shall have federal recognition for both their grade and positions."* (Emphasis supplied.)

The statute leaves no room for doubt that federal recognition of the grade and position of the officer in question is required before such officer can be considered eligible for duty under c. 33, § 18 (a). Should federal recognition be lost for some reason, the officer whose recognition is withdrawn cannot continue to perform his duties. In the present case, an officer is about to reach the retirement age specified in the Reserve Officers Personnel Act. Upon such occurrence, federal recognition will automatically terminate, and the officer will no longer be eligible for duty under c. 33, § 18 (a).

You imply in your letter that promotion to the rank of colonel may relieve the officer in question from the necessity of immediate retirement under the provisions of the Reserve Officers Personnel Act. An individual may, of course, be promoted without interfering with his activity under c. 33, § 18 (a). However, I should point out that the statute authorizes only one colonel among the three officers that may be selected. Consequently, should there already be a colonel on active duty in division headquarters under this program, and should a lieutenant colonel in the program be promoted, the services of both officers could not lawfully be retained under c. 33, § 18 (a).

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.



*c. 111, § 70 G. L. applies only to institutions which are licensed by the Department of Public Health. The showing of records of mental health institutions is controlled entirely by c. 123, except those with licenses which come under c. 111, § 70.*

MAY 4, 1964.

HARRY C. SOLOMON, M.D., *Commissioner of Mental Health.*

DEAR DOCTOR SOLOMON: — I have received your letter requesting my opinion on the subject of inspection of records pursuant to G. L. c. 111, § 70 and c. 66, § 10. You have posed the following questions:

"1) Does Section 70 of Chapter 111, General Laws, apply to the State Hospitals and Clinics operated in whole or in part by the Department of Mental Health, and to the private hospitals and schools licensed by the Department of Mental Health, particularly that part which pertains to inspection of records by the patient to whom they relate or by his attorney?

"2) If the answer to the foregoing is negative, then are the records of the institutions operated by or licensed by the Department of Mental Health subject to Section 10 of Chapter 66, General Laws?

"3) If the answer to question #2 is affirmative, then until such time as we can seek remedial legislation, have we any legal means to prevent our patients' records being viewed by anyone who wishes to see them?

"4) If the answer to question #2 is negative, under what circumstances may our patients' records be made available to persons who wish to see them?

The questions submitted require interpretation of G. L. c. 111, § 70, which regulates the keeping and inspection of certain hospital records, and which provides in part as follows:

"Hospitals, dispensaries or clinics, and sanatoria *licensed by the department of public health* shall keep records of the treatment of the cases under their care and the medical history of the same . . . . Section ten of chapter sixty-six shall not apply to such records; provided, that such records and similar records kept by the licensee may be inspected by the patient to whom they relate or by his attorney upon delivery of a written authorization from the said patient, and a copy shall be furnished upon his request and a payment of a reasonable fee; and provided, further, that upon proper judicial order, whether in connection with pending judicial proceedings or otherwise, or, except in the case of records of hospitals under the control of the department of mental health, upon order of the head of the state department which issues the license and in compliance with the terms of said order, such records may be inspected and copies furnished on payment of a reasonable fee. (Emphasis supplied.)

The statute in question admittedly is far from clear, and an attempt must be made to determine the intent of the General Court. Prior to 1956, c. 111, § 70 referred to "hospitals supported in whole or in part by contributions from the Commonwealth", thus clearly applying to all public institutions, with no distinction made between hospitals which treated physical ailments and those that concentrated upon mental illness. By c. 203 of the Acts of 1956, the Legislature extended the applicability of § 70 to private institutions by changing the first clause to refer to

"hospitals licensed by the department of public health". At present, the statute refers to "hospitals, dispensaries or clinics, and sanatoriums licensed by the department of public health".

Accordingly, the history of c. 111, § 70 indicates that the intention of the General Court was to limit the effect of the statute to public health institutions only, while generally exempting mental health facilities from its operation. The 1956 amendment which revised the first clause by inserting the reference to the Department of Public Health is a persuasive indication that the Legislature sought to relieve mental health institutions of the necessity of exhibiting records to patients.

From a practical point of view, there is a clear distinction between records of a public health institution and those of a mental hospital. Although a patient being treated for some physical infirmity may well be entitled to information relating to his illness and treatment, yet a mental patient may be severely harmed by exposure to records pertaining to his difficulty. The rationale of the distinction has been discussed in the Twenty-Second Report of the Judicial Council of Massachusetts, when, in 1947, consideration was being given to proposed changes in § 70.

"As we understand House 63, which we are asked to report upon under Resolve 14 of 1946, the bill is designed to exclude from the operation of this law hospitals under the control of the department (of mental health). It is readily understandable that in many cases it would be extremely inadvisable to allow a mental patient to inspect his record or allow him to have a copy of it."

I am aware of the fact that c. 111, § 70 makes reference in one clause to "records of hospitals under the control of the department of mental health". This does not mean, however, that all mental health institutions are subject to the section. There are in the Commonwealth a few hospitals which, though licensed by the Department of Public Health, are still operated and controlled by the Department of Mental Health. Since such institutions receive Public Health licenses, they become subject to the provisions of § 70; facilities licensed by the Department of Mental Health remain unaffected by the section, as do State Hospitals and Clinics under the control of the said Department. Accordingly, in answer to your first question, I advise you that c. 111, § 70 applies only to institutions which are licensed by the Department of Public Health.

I will, therefore, address myself to your other questions. "Public records" are defined by G. L. c. 4, § 7 as records required to be kept by law or required to be received for filing, and G. L. c. 66, § 10 provides that "public records" must be open to reasonable inspection. However, these sections must be construed in conjunction with other provisions of the General Laws.

Chapter 123, which governs the operations of the Department of Mental Health, provides for the keeping of certain records. Thus, there must be maintained a registry of mental defectives (§ 13); records of transfers (§ 20); records of commitments and admissions (§ 24); etc. Since such records must be maintained by law, they admittedly conform to the definition of "public records". However, this does not necessarily mean that they need be shown indiscriminately. Chapter 123 itself imposes restrictions upon the showing of certain records. For example, c. 123, § 13 provides that the records which constitute the required registry of mental defectives shall not be open to public inspection. Such provisions for

disposition of particular records supersede c. 66, § 10, which statute applies only in the absence of other, more specific methods of handling the records in question. Of course, mental health records not required to be kept by law would not be considered public records in any event, and would not have to be shown.

Where the showing of records is specifically treated in c. 123, hospital personnel may not go beyond the statute and make records available to unauthorized individuals. Likewise, a court would have no authority to order the showing of such records to persons not legally entitled to examine them. Accordingly, it is my opinion that the showing of records of mental health institutions is controlled entirely by the provisions of c. 123, with the exception of records of those few facilities which, though controlled by the Department of Mental Health, have Public Health licenses, and are, consequently, subject to c. 111, § 70. Where records are not required to be kept, they may presumably be made available or withheld at the discretion of those in charge of the particular patient's treatment. Because of the negative response to question #2, I have not treated with your third inquiry.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*So long as a licensed firearm, whether it be issued for hunting or any other purposes, is under the direct control of the licensee when carried in a vehicle, no law is violated.*

MARCH 4, 1964.

MR. CLAYTON L. HAVEY, *Acting Commissioner, Department of Public Safety*.

DEAR SIR: — I have your request of April 13, 1964 in which you ask the following questions:

"1. Would a license issued to a person under the provisions of c. 140, s. 131, of the G. L. be valid if the person takes up residence in another state?

"2. Would a license issued to a person for hunting cover him when carrying a loaded pistol in his car, or would it just cover him while hunting?"

The aforesaid c. 140, § 131 provides, in part:

"The chief of police or the board or officer having control of the police in a city or town, . . . after an investigation, may, upon the application of any person, . . . *residing or having a place of business within their respective jurisdiction*, . . . issue a license to such applicant to carry firearms in the commonwealth or to possess therein a machine gun, if it appears that he is a suitable person to be so licensed, . . ." (Emphasis supplied.)

The quoted provision of § 131 expresses a clear requirement that an applicant for a license to carry a pistol must reside or have a place of business within the jurisdiction from which he seeks the said license. It is apparent from this requirement and a reading of the section as a whole that the intent of the General Court is to have local licensing authorities employ every conceivable means of preventing deadly weapons in the

form of firearms coming into the hands of evildoers. The legislation should be construed with that thought in mind. Viewed in this light the requirement of residence is most important.

Law enforcing agencies must be in a position to keep a constant check on those to whom it has granted licenses. The fact that a licensee becomes a non-resident makes it virtually impossible to check on violations by the said licensee. It must be concluded that a license granted to a person who later resides in another state becomes inoperative.

This position is further buttressed by the fact that the Legislature provided different qualifications for the issuance of permits to non-residents in § 131F of c. 140.

A clear implication of this section is that a non-resident is within a wholly different status and as such must comply with the requirements of § 131F. Consequently, a licensee who becomes a non-resident of Massachusetts would no longer fall within the jurisdiction of local licensing authorities and § 131 would no longer apply.

It is my opinion, therefore, that the answer to your question (1) must be in the negative.

Question (2) is answered by c. 140, § 131C, which states:

"No person carrying a firearm or firearms under a license issued under section one hundred and thirty-one shall carry the same in a vehicle unless such firearm or firearms while so carried therein is under the direct control of such person, and whoever violates the foregoing shall be punished by a fine of not more than one hundred dollars. A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the authority who issued the license who shall immediately revoke the license of the person so convicted. No new license under said section shall be issued to any such person until one year after the date of revocation."

In conclusion, so long as a licensed firearm, whether it be issued for hunting or any other proper purpose, is under the direct control of the licensee when carried in a vehicle, no law is violated.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Under c. 54, § 12, the selectmen must exhaust all qualified names on the list before appointing any individuals whose names have not been submitted by town committee chairman for election officers.*

MAY 6, 1964.

HONORABLE KEVIN H. WHITE, *Secretary of the Commonwealth*.

DEAR SIR: — I have received your letter of April 1, 1964 relative to the effect of G. L. c. 54, § 12, upon the appointment of election officers in towns. You have inquired whether pursuant to this section it is mandatory for selectmen to appoint qualified individuals from the lists furnished by town committee chairmen before they appoint persons whose names do not appear on such lists.

G. L. c. 54, § 12 provides that the selectmen of every town shall annually appoint a specified number of election officers. For the purpose of providing names of interested individuals, the chairman of the town

committee of each political party is authorized to file with the selectmen a list of enrolled party members who desire appointment. Supplemental lists may be filed in order to fill vacancies occurring on the original lists; but the names on original lists must be exhausted before appointments may be made from supplemental lists.

The selectmen may conduct examinations to determine whether particular individuals are qualified to be election officers. The statute further provides:

... upon the expiration of fifteen days after notice given in writing prior to June fifteenth in any year by the selectmen to the chairman of any political committee who has not filed original or supplemental lists, the selectmen may appoint as election officers enrolled members of the party who, in the opinion of the selectmen, are qualified to act as such.

When making the eventual selections, the selectmen must, under Section 13 of said Chapter 54, ensure that the two leading political parties are equally represented.

The statute leaves no room for doubt that qualified people on the lists filed by the town committee chairmen must be chosen before the selectmen may appoint persons whose names have not been submitted. The Legislature has carefully provided for the submission of names of persons who are interested in appointment. But the statutory framework would be of little consequence were the selectmen authorized to ignore the lists filed by the town committee chairmen. It does not appear to be the purpose of the statute to establish a selection system that would be followed only when the selectmen involved desired.

In fact, the very language of the statute limits the right of the selectmen to choose individuals whose names do not appear on the lists. Under c. 54, § 12, the selectmen must, prior to June fifteenth, give notice in writing to the chairman of any political committee who has not submitted lists. Fifteen days after the giving of such notice, the selectmen may then "appoint as election officers enrolled members of the party who, in the opinion of the selectmen, are qualified to act as such". The implication is clear that the selectmen must choose names from properly filed lists unless such lists are unavailable. Accordingly, it is my opinion that under c. 54, § 12, the selectmen must exhaust all qualified names on the lists before appointing any individuals whose names have not been submitted by town committee chairmen.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Should the State Ballot Law Commission find that the Board of Registration of any town did not certify the signatures as required it would be within the jurisdiction of the Board to find that the petition in question does not contain the signatures of "qualified voters."*

MAY 12, 1964.

MR. ROBERT J. O'HAYRE, *Chairman, State Ballot Law Commission*.

DEAR MR. O'HAYRE: — On behalf of the State Ballot Law Commission you have requested my opinion as to the applicability of Chapter 53, section 22A to the following facts:

You write that the Commission has evidence that some Boards of Registrars or Election Commissions have failed to comply with the Act by not issuing or receiving receipts as required thereby. You ask "what credence, if any, should be given to petitions where no receipts were given to petitioners when the petitions were filed for certification and no original receipts were obtained from the petitioners when they collected the certified petitions?"

Before considering the precise question asked, the jurisdiction of the State Ballot Law Commission with respect to Initiative and Referendum Petitions must be considered. The jurisdiction with respect to such matters is fixed by G. L. c. 53, section 22A. Section 22A provides as follows:

"The provisions of law relative to the signing of nomination papers of candidates for state office, and to the identification and certification of names thereon and submission to the registrars therefor, shall apply, so far as apt, to the signing of initiative and referendum petitions and to the identification and certification of names thereon, and, except as otherwise provided, to the time of their submission to the registrars. Registrars shall receipt in writing for each initiative or referendum petition submitted to and received by them, and shall deliver such petitions only on receiving written receipts therefor. Objections that signatures appearing on an initiative or referendum petition have been forged or placed thereon by fraud and that in consequence thereof the petition has not been signed by a sufficient number of qualified voters actually supporting such petition, as required by the constitution, may be filed with the state secretary not later than five o'clock in the afternoon on the thirtieth week day succeeding the last day for filing such petition. The state secretary shall refer the same, to the state ballot law commission, which shall investigate the same, and for such purpose may exercise all the powers conferred upon it relative to objections to nominations for state offices, and if it shall appear to said commission that the objections have been sustained it shall forthwith reject the petition as not in conformity with the constitution and shall notify the state secretary of its action."

From the above it is clear that the jurisdiction of the State Ballot Law Commission is limited to "objections that signatures appearing on an Initiative or Referendum Petition have been forged or placed thereon by fraud and that in consequence thereof the petition had not been signed by a sufficient number of qualified voters actually supporting such petition, as required by the Constitution", forwarded to the Commission by the Secretary of the Commonwealth. *Compton vs. State Ballot Law Commission*, 311 Mass. 643, 653. *Morrissey vs. State Ballot Law Commission*, 312 Mass. 121 139.

The statute further provides that with respect to such objections the Commission may exercise all the powers conferred upon it relative to objections to nominations for state offices. However, as stated by the Court in *Compton vs. State Ballot Law Commission*, *supra*, p. 653, "whatever may be the scope of the objections to nominations that are within the jurisdiction of the State Ballot Law Commission, this broad language does not extend to the jurisdiction of the Commission with respect to objections to Initiative Petitions beyond the scope of the objections specifically described in G. L. (Ter. Ed.) c. 53, section 22A as amended." The

provisions of said section 22A incorporating matters relating to nomination papers, "so far as apt," do not apply where it is "otherwise provided," and it is "otherwise provided" with respect to objections to Initiative and Referendum Petitions by the express language of said section 22A limiting objections within the jurisdiction of the State Ballot Law Commission to objections of the two classes therein described.

The provision of c. 53, about which the Commission specifically inquires provides that registrars shall receipt in writing for each Initiative or Referendum Petition submitted to and received by them, and shall deliver such petitions *only* on receiving written receipts therefor.

Obviously, the above provision of section 22A was drafted, in part, to insure that the submission of such petitions to the people should not be accomplished by means of signatures "placed" upon a Referendum Petition "by fraud". It is my opinion that it would be beyond the jurisdiction of the Commission under section 22A to reject a Referendum Petition solely by reason of the failure of Registrars to provide or ask for receipts as required. However, insofar as such omission is relevant and material to the question of whether said signatures were placed upon the document by fraud then evidence of the same might be received and considered by the Commission for whatever probative value it might have in this connection. The hearings convened by the State Ballot Law Commission to hear objections to the legislative pay raise Referendum are limited by statute as set forth above and there is no statutory basis for them to expand this jurisdiction. *Compton vs. State Ballot Law Commission, supra*.

Your letter of April 16, 1964 contains yet another inquiry pertaining to the hearings you conducted in relation to objections filed to the Referendum Petitions concerning the legislative pay raise.

You write that a petition containing 47 certified names has been filed from the Town of Hancock and is before the Commission. Evidence has been received by the Commission which states that no petition on the pay raise was received or certified by the Board of Registration in the Town of Hancock.

Article 48 of the Amendments to the Constitution of the Commonwealth of Massachusetts provides that provision "shall be made by law for the proper identification and certification of signatures to Referendum Petitions." It should be noted that the requirement of certification in the General Laws does not change the constitutional qualifications for signing a Referendum Petition but merely provides a statutory method of insuring that such qualifications by a person may be ascertained. It is my opinion that evidence that a petition has not been certified as required by law may properly be considered by the State Ballot Law Commission insofar as it has relevancy to the ultimate question before the Commission as to whether the petition "fails to bear a sufficient number of signatures of qualified voters as required by the Constitution." *Morrissey vs. State Ballot Law Commission*, 312 Mass. 121, 134.

G. L. (Ter. Ed.) c. 53, section 7, which is applicable to nomination papers, and is "apt" (See section 22A set forth above) with respect to Referendum Petitions, providing for the checking and certification of signatures, provides that "only names so checked shall be deemed to be names of qualified voters for the purposes of nomination." *Compton vs. State Ballot Law Commission, supra*, p. 658.

Thus, should the Commission find that the Board of Registration of any town, in fact, did not certify the signatures as required, it is my opinion that it would be within the jurisdiction of the Board to find that the petition in question does not contain the signatures of "qualified voters".

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The project contemplated by the Regional Rehabilitation Research and Demonstration Center of Northeastern University would violate the General Laws, 5/15/64 c. 6, § 84 and should not be permitted.*

MAY 15, 1964.

HON. FRANCIS A. HARDING, *Commissioner of Rehabilitation*.

DEAR COMMISSIONER HARDING: — I have your letter of March 13, 1964 relative to examination of records of the Massachusetts Rehabilitation Commission. You state that the Regional Rehabilitation Research and Demonstration Center of Northeastern University wishes to conduct a research program based upon material accumulated by the Commission. Such a program would necessitate examination of the records of certain individuals currently being served. You have requested my opinion as to whether you as Commissioner may, in light of the restrictions contained in G. L. c. 6, § 84, permit the staff of the Research and Demonstration Center to review Commission records.

General Laws c. 6, § 84 provides that information and records of applicants for vocational rehabilitation shall be confidential.

"Information or records concerning any applicant for vocational rehabilitation shall be confidential and for the exclusive use and information of the commission in the discharge of its duties. Such information or records shall not be open to the public, notwithstanding the provisions of section ten of chapter sixty-six or other provisions of law, and shall not be admissible in any action or proceeding unless the commission is party to such action or proceeding. . . . Whoever, except with the authority of the commissioner or pursuant to his rules and regulations, or as otherwise required or authorized by law, shall disclose such information shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than six months, or both."

It is clear that under most circumstances the records of the Massachusetts Rehabilitation Commission must be used only for the purpose of discharging the actual duties of the Commission itself. Such records are not considered public, and must be protected from general scrutiny. Without such assurance of confidential treatment, prospective applicants might well be discouraged from availing themselves of the Commission's services. The seriousness of the legislative determination that applicants' records remain confidential is demonstrated by the criminal penalty imposed for improper disclosure.

The statute does designate three exceptions to the requirement that Commission records must not be made public. The applicant or his attorney is entitled to information concerning the applicant's record



"which is necessary to him in his relations with the commission". Such information may be supplied to persons or Commonwealth departments, divisions or subdivisions directly concerned with the applicant's vocational rehabilitation. Finally, the Commission itself may publish such information in statistical form, so long as the identities of individuals whose records have been used are not disclosed.

The conclusion is inescapable that the above are the sole exemptions contemplated by the General Court. By enumerating three occasions upon which the general requirement that Commission records are to be confidential is to be suspended, the Legislature clearly implies that the requirement shall be in effect at all other times. The project that is contemplated by the Northeastern University group does not fall within any of the exempted categories. The project does not relate to vocational rehabilitation of an individual applicant, and the material gathered would be compiled and published by the Research and Demonstration Center rather than by the Commission itself.

The fact that federal grants from the Vocational Rehabilitation Administration in Washington support both the Commission and the Research and Demonstration Center cannot change the effect of the statute. I am aware that the statute's criminal provision applies to individuals who disclose confidential information "except with the authority of the commissioner or pursuant to his rules and regulations". This language simply limits the application of the criminal provision; it in no way expands the authority of the Commissioner beyond what is granted by the remainder of the section. Consequently, it is my opinion that the project contemplated by the Regional Rehabilitation Research and Demonstration Center of Northeastern University would violate the provisions of G. L. c. 6, §84 and should not be permitted.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Registry of Motor Vehicles should continue to exempt cities and towns from the requirement of furnishing compulsory insurance certificates as a condition to registering municipally-owned vehicles.*

MAY 18, 1964.

HON. JAMES R. LAWTON, *Registrar fo Motor Vehicles*.

DEAR REGISTRAR LAWTON: — I have received your letter relative to compulsory insurance certificates in connection with vehicles owned by the Commonwealth or by a political subdivision thereof. You have pointed out that G. L. c. 90, § 1A, which requires the furnishing of compulsory insurance certificates as a condition to registration exempts such state, county or municipal vehicles. On the other hand, the concluding sentence of the first paragraph provides that "motor vehicles and trailers used by the fire or police department of any city or town or park board solely for the official business of such department or board shall not be subject to the requirements of this section". In the light of this apparent ambiguity, you have asked whether the Registry should exempt all municipally-owned vehicles from the compulsory insurance certificate requirement, or only those vehicles that are used by the fire or police departments or park boards solely for official business.

It is my opinion that the current Registry practice of exempting all municipally-owned vehicles is correct and should be continued. It should be noted that the first sentence of the statute in question refers to vehicles *owned* by the Commonwealth or its political subdivisions, and relieves all such vehicles of the compulsory insurance certificate requirement. The final sentence of the first paragraph, however, is not limited to vehicles *owned* by the specified departments and boards, but relates to vehicles *used* by such bodies for official business. Consequently, the category of exempted municipal vehicles is expanded to include those vehicles which, although not actually owned by the city or town in question, yet are used exclusively for certain municipal purposes.

The history of the statute supports the above interpretation. Prior to amendment of the law in 1950, the last sentence of the first paragraph read as follows:

"Ambulances, fire engines and apparatus, police patrol wagons and other vehicles used by the police department of any city or town or park board solely for the official business of such department or board (*whether or not owned as aforesaid*) shall not be subject to the requirements of this section." (Emphasis supplied.)

There have been changes in wording, but the general sense of the statute remains the same.

Therefore, on the basis of the opening sentence of the statute, the Registry should continue to exempt cities and towns from the requirement of furnishing compulsory insurance certificates as a condition to registering municipally-owned vehicles. In addition, vehicles used by fire and police departments and park boards solely for official business should be granted the same exemption, whether or not such vehicles are actually owned by the city or town in question.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The determination of whether so-called "garden crypts" fall within the general classification of "community mausoleums" is a question of fact for determination by the Department of Public Health.*

MAY 20, 1964.

HON. ALFRED L. FRECHETTE, M.D., *Commissioner of Public Health*.

DEAR SIR: — I have your communication wherein you request my opinion concerning whether so-called "garden crypts" fall within the general classification of "community mausoleums" under G. L. c. 114, §§ 43B and 43D through 43N, copies of which are enclosed.

The intent of G. L. c. 114 is to insure that structures containing dead bodies,

1. *are properly located and controlled.*

Section 43A — who may own, maintain or operate cemeteries,

Section 43B — forbidden sales or conveyances, and

Section 43D — community mausoleum, crematory, etc., to be located within cemetery;

2. *are properly constructed.*

Section 43E — prerequisites to erection of community mausoleum, etc.,

Section 43F — supervisory control of Department of Public Health, inspector,

Section 43G — prerequisites to use of community mausoleum,

Section 43H — completes prerequisites of sale of crypt in community mausoleum; and

3. *are properly maintained.*

Section 43M — permanent disposition of dead bodies or remains,

Section 43I — remains of dead bodies constituting menace to health,

Section 43J — fund for care, maintenance and improvement of community mausoleum, and

Section 43L — abating or enjoining nuisance; abating or enjoining nuisance;

4. *are adequately protected with funded reserves.*

Section 43J — fund for care, maintenance and improvement of community mausoleum, and

Section 43K — custody, administration and enforcement of fund.

General Laws, c. 114, § 43N establishes penalties for those failing to comply with these sections. In addition, § 43G specifically provides certain prerequisites for use, namely: "No community mausoleum, crypt or structure erected as aforesaid shall be used for the purpose of depositing therein the remains of any dead body until such mausoleum, crypt or structure, or a component section thereof, is fully completed, and the permanent care and improvement fund required by section forty-three J has been established," and in § 43H, prerequisites to the sale of crypts, namely: "No crypt in a community mausoleum shall be sold or offered for sale before said structure, or a component section thereof, is fully completed."

In making a determination, the department must decide whether or not a proposed project is one of the following:

(1) A structure containing crypts intended to hold or contain the bodies of the dead permanently, a mausoleum.

(2) A structure containing niches for cinerary urns or other containers for the ashes or cremated bodies, a columbarium.

(3) An excavation in the earth for use as a place of burial, a grave.

(4) A tomb on private land for the exclusive use of the family of the owner (see § 43).

(5) A structure containing crypts erected or controlled by a church or a religious society and used only as a repository for the remains of the clergy or dignitaries of such church or religious society (see § 43D).

The requirements of G. L. c. 114, §§ 43B and 43D through 43N apply if the proposed project falls under the first classification, namely, a structure containing crypts intended to hold or contain the bodies of the dead permanently.

It is my opinion that this matter involves a question of fact for determination in each instance by your department.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*The fact that the Town of North Attleboro keeps its books on the cash basis does not prevent transfer of accounts receivable of the Municipal Lighting Plant for the purpose of reducing the general tax levy.*

MAY 21, 1964.

MR. NORMAN MASON, *Chairman, Department of Public Utilities.*

DEAR MR. MASON: — I have received your letters of March 6 and April 1, 1964, relative to accounting practices of the Municipal Lighting Board of the Town of North Attleboro. You have informed me that the Municipal Lighting Plant in question has, pursuant to G. L. c. 164, § 63 and regulations enacted thereunder by the Department of Public Utilities, adopted the accrual accounting method. The Town of North Attleboro, however, keeps its records on a cash receipts basis, as required by G. L. c. 44, § 56.

At the close of 1963, the Municipal Lighting Plant had available the sum of \$55,037.85 as surplus after expenditures for capital purchases. This figure represented a cash balance of \$16,951.80 and accounts receivable totaling \$39,086.05. The North Attleboro town meeting now desires to transfer these amounts to the Town Treasury for the purpose of reducing the general tax levy. You have raised the following questions in connection with this proposed transaction.

“1. If the Municipal Lighting Plant over which this Department has jurisdiction under the authority of G. L. c. 164, has adopted an accrued accounting procedure approved by this Department, and wishes to transfer an amount representing unexpended accrued profit for the year, to what extent, if any, does the Municipal Finance Act, c. 44 of the General Laws, alter this jurisdiction and this method of accounting with specific reference to the cash profit or accrued profit remaining at the end of the fiscal year?

“2. If a municipal lighting plant has adopted accrued accounting practice in conformance with the uniform system of accounts, what city or state department has the authority to determine the amount of surplus available for disposition by the local appropriating authorities?

“3. In a municipality having an electric department, does a Town Treasurer without direction or voucher have the authority to change, affect or ‘reserve’ any municipal electric department account concerning a lawful and prime reoccurring expense such as purchased power?”

Section 23 of c. 59 of the General Laws governs the annual assessment of local taxes. The assessors must assess taxes to cover all amounts “appropriated, granted or lawfully expended” by their respective towns since the last annual assessment. In addition, the assessment figure must cover all amounts required by law to be raised by taxation; all debt and interest charges maturing during the year, and not otherwise provided for; all amounts necessary to satisfy final judgments against the town; and all amounts necessary to cover abatements for previous years in excess of the overlay for such years.

The statute further provides for the deduction of certain amounts from the total required to be assessed.

“ . . . *The assessors shall deduct from the amount required to be assessed (a) the amount of all estimated receipts of their respective towns*

*lawfully applicable to the payment of the expenditures of the year, excluding sums to be received from the commonwealth or county for highway purposes and excluding estimated receipts from loans and taxes, but including estimated receipts from the excise levied under chapter sixty A and receipts estimated by the commission under section twenty-five A of chapter fifty-eight, (b) the amount of all appropriations voted from available funds for the purpose of deduction, and (c) the amount of all other appropriations voted from available funds. . . .*" (Emphasis supplied.)

Deductions on account of estimated receipts, as governed by clause (a), need not be approved by the Commissioner of Corporations and Taxation, upon the condition that such deductions do "not exceed the aggregate amount of actual receipts received during the preceding financial year from the same sources". Deductions may, however, exceed the previous year's receipts if written approval is obtained from the Commissioner.

It is clear that neither clause (b) nor clause (c) of the statute authorizes the deduction of amounts representing accounts receivable. Each clause refers to "appropriations voted from available funds", thereby restricting the deductions to sums that are actually available in the Town Treasury. But clause (a) is not restrictive in this way. This clause provides for the deduction of amounts that the town reasonably expects to receive during the year. Accrual accounting procedure is therefore recognized by the statute, at least for purposes of tax assessment. Clause (a) authorizes the assessors to estimate amounts that the town may expect to receive during the year, and to deduct such amounts from the sum that must be raised by taxation. I see no reason why accounts receivable of a municipal lighting plant (which plant is in effect a municipal department) should not be utilized to reduce the tax rate under the authority of clause (a). Assuming that the town meeting votes to transfer the accounts receivable in question for this purpose, the fact that the town keeps its books on a cash receipts accounting basis under the Municipal Finance Act would not prevent reduction of the amount to be assessed pursuant to c. 59, § 23.

If the town meeting votes to transfer the accounts receivable to the Municipal Lighting Plant, it then becomes the responsibility of the assessors to determine what percentage of such accounts should be deducted from the amount to be assessed. Chapter 59, § 23 provides that the assessor shall make deductions on account of estimated receipts, with approval by the Commissioner of Corporations and Taxation necessary only if the amount of the deduction in question exceeds actual receipts received during the preceding year from the same source. The assessors may, of course, confer with other officials; but the eventual decision as to the amount available for purposes of reduction of the tax rate must, under the statute, be his own.

Your third question refers to the attempt of the Town Treasurer to set aside part of the cash balance of the Municipal Lighting Plant in order to create a "reserve" to meet an account payable. Apparently the Light Department had a cash balance of \$74,603.29 at the end of 1963, with an account payable on record of \$57,651.49 for purchased power. The Treasurer, without authorization by either the Selectmen or the Light Department, set aside cash equivalent to the amount of the account payable, and reported only \$16,951.80 as the cash balance.

I find nothing that authorizes the Town Treasurer to take such action. The Municipal Lighting Plant keeps its records on an accrual accounting

basis, and may properly do business with accounts payable outstanding. The Treasurer cannot allocate amounts in the treasury without instructions from the Selectmen or from the Municipal Department involved. Should the Municipal Lighting Plant accumulate accounts payable unwisely, there are audits and controls prescribed by statute. It is not the function of the Town Treasurer to act as financial overseer of a municipal department without direction from the Board of Selectmen.

Consequently, it is my opinion that the fact that the Town keeps its books on the cash receipts accounting basis under G. L. c. 44 does not prevent transfer of accounts receivable of the Municipal Lighting Plant for the purpose of reducing the general tax levy. Likewise, it does not confer authority upon the Town Treasurer to allocate parts of a cash balance in order to guarantee the honoring of an account payable by a municipal department.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*Under the laws of Massachusetts, the taking in the name of SpaceRace, Inc., was a good taking being against the record owner although legal title was vested in the Trustees in Bankruptcy on the date of the taking.*

JUNE 1, 1964.

JAMES D. FITZGERALD, *Commissioner, Department of Public Works*.

Re: AMESBURY, L.O. 5377, Parcel 1-8A-2, Taken in name of Space Race, Inc.

DEAR SIR: — In reply to your letter of May 15, 1964 on the captioned matter, please be advised that it should initially be recognized that all non-exempt property of a bankruptcy passes retroactively to the Trustee in Bankruptcy as of the date of the filing of the petition upon adjudication of bankruptcy and the appointment and qualification of the Trustee.

You have indicated that in this case the petition in bankruptcy was filed on July 26, 1963, adjudication was made on September 24, and Receiver and Trustee was appointed on September 25th. Therefore, at the time of filing of one Order of Taking, October 1, 1963, title was in Wilfred H. Smart as Receiver and Trustee of the said Bankrupt subject to a trust and second mortgage as set forth in abstractor certification of title under date of April 23, 1964.

The first question in your letter of May 15th, contained in the third paragraph thereof is: "Was the taking in the name of Space Race, Inc., a good taking, being against the record owner although legal title was vested in the Trustee in Bankruptcy on the date of this taking?"

The answer to the above question must be affirmative under the laws of Massachusetts. Under the theory of compulsory sale wherein eminent domain is considered as an inherent sovereign power to compel a holder of property to yield his title to the sovereign, if title was found to be invalid because a mistake had been made in ascertaining the ownership, the condemnation would have to be repeated or the public could be ousted by the true owner. In those jurisdictions which subscribe to that

theory it is held that condemnation proceedings pass nothing more than the title to whatever interests were possessed by persons who were made party to the proceedings. *Nichols on Eminent Domain*, 9.1 (2). In such jurisdiction a party not notified is not bound by the award and the sovereign would fail to acquire a perfect title.

In Massachusetts it is otherwise. Here the cases hold that the power of eminent domain is a proceeding "*in rem*". *Edmunds v. Boston*, 100 Mass. 535; *Nichols* 1.142. The power acts upon the land itself, not upon the title or upon the sum of the titles. Upon recording of the order of taking all inconsistent proprietary rights are divested and not only privies, but strangers are concluded. Therefore, whoever may have been the owner or whatever the character of his estate, the paramount title is in the public, not as claiming under him by a statutory grant, but by an independent title. The owner is entitled to full compensation according to his interest and to the extent of the taking.

Provided that the order of taking otherwise complied with Section 1 of Chapter 79 Mass. General Laws, the taking in the name of Space Race, Inc., rather than the Trustee in Bankruptcy would not vitiate the taking or impair the paramount title of the Commonwealth.

The second question in your May 15th letter, contained in the fourth paragraph thereof is: "From whom should the Commonwealth obtain release and with whom should it negotiate a Land Damage Agreement?"

A legal exposition on this question would be obviated by obtaining releases from all parties who had a record or retroactive interest at the time of the recording of order of taking: Trustee in Bankruptcy Smart, First Mortgagee Provident Institute for Savings, John Briston Sullivan et al as Second Mortgagees and the Embassy Acceptance Corporation of Westwood. Payment would be made on the basis of an apportionment sheet signed by all parties.

Certain factual aspects of the problem are not clear. In the second paragraph of your May 15th letter you wrote that on April 6, 1964 the Trustee *conveyed* the real estate to Embassy Acceptance Corporation. The answer herein to the first question in your May 15th letter indicates that any such conveyance could not have been effective as to Parcel 1-8A-T. Any further answer to your second question of May 15th will require examination of the complete abstract of title and abstractor certification of title.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*In regards to a land taking, loam having been severed from its natural state stacked or piled has thereby become personal property.*

JUNE 9, 1964.

MALCOLM E. GRAF, *Director and Chief Engineer, Water Resources Commission*.

Re: SuAsCo Reservoir A-6h-Parcels 303, 303-1.

DEAR SIR: — By letter dated May 13, 1964, you requested my opinion on the following question: ". . . is the loam pile which was stacked on

the property before the taking the personal property of Herman Sparrow or part of the real estate that we acquired?"

It appears that the loam referred to was once a part of the surface of the taken property in its natural condition but had been stacked in piles before the taking.

Land, lands and real estate are defined in Section 7, Chapter 4 of the General Laws of the Commonwealth as follows: ". . . 'Land', 'lands', and 'real estate' shall include lands, tenements and hereditaments, and all rights thereto and interests therein; . . ."

"The term [real property] covers all that goes to make up the earth in its natural condition." (emphasis supplied) 42 Amer-Jur. § 13.

"Anything detached from the realty becomes personalty instantly. Thus when things which in their natural state form part of the freehold are severed therefrom and converted into chattels, they belong to the owner of the land; and when any part of the freehold, such as coal, minerals, sand, gravel, crops, or fixtures are severed from the freehold, they become personalty." 73 C.J. 2d § 11.

Analagous to the problem raised by your letter is the question of when timber becomes personal property. "Growing trees permanently located on land . . . usually described as standing wood and timber but including growing shade and ornamental trees are part of the freehold until severed therefrom." *Paine v. Board of Assessors of Town of Weston*, 297 Mass. 173 (emphasis supplied). Timber becomes personalty when it is cut and separated from its natural state.

It is my opinion that having been severed from its natural state stacked or piled loam has thereby become personal property.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Board of State Examiners of Plumbers may forward a request for refund of certain deferred renewal charges together with reasons therefor to the State Treasurer and that the Treasurer may—if he deems the reasons sufficient—return sums in question.*

JUNE 11, 1964.

MRS. HELEN C. SULLIVAN, *Director of Registration, Department of Civil Service and Registration.*

DEAR MRS. SULLIVAN:—I have received your letter relative to the authority of the Board of State Examiners of Plumbers over the deferred renewal fees provided for by G.L. c. 142, § 6. You have asked whether the Board has legal authority to decide whether such a deferred fee should or should not be imposed. If the imposition of a late charge is discretionary, you further inquire whether the Board may request the State Treasurer to refund late charges that have previously been assessed and paid.

General Laws c. 142 authorizes the Board of State Examiners to issue both master plumber and journeyman licenses. Section 6 of said c. 142 provides in part as follows:



"... Licenses shall be issued for one year and may be renewed annually on or before May first, or, *in case of absence, sickness or other disability of the holder, on or before such later date as the examiners may permit*, upon payment of the required fee. . . . In case of failure to renew a license as aforesaid on or before May, first in any year or such later date as the examiners may permit as aforesaid, the person named therein may, *upon payment of the said fee and, at the discretion of the examiners, a deferred renewal fee of ten dollars*, increased by such additional fees as would have been payable had such license been continuously renewed, receive a deferred renewal thereof which shall expire on the ensuing first day of May; provided, that such renewed license shall not constitute its holder a licensee for any period preceding its issue." (Emphasis supplied.)

The statute clearly provides that licenses are to be issued on an annual basis, with the first day of May the cut-off date for renewal. However, recognizing the fact that extenuating circumstances might cause an unavoidable delay in submitting a renewal application, the General Court authorized renewal "in case of absence, sickness or other disability of the holder, on or before such later date as the examiners may permit." Accordingly, it is within the discretion of the State Examiners to extend the time for filing a renewal application for the above reasons.

The question of a "deferred renewal fee" arises only in case of failure to renew by May first or by such later date as may be permitted by the Board because of absence, sickness or other disability. Under such circumstances, renewal of a license may still be obtained upon payment of the usual fee "and, at the discretion of the examiners, a deferred renewal fee of ten dollars." It is clear that the deferred renewal fee applies only to applications filed after any extension of time that has been granted because of illness or other specified cause. In addition, the imposition of the ten dollar deferred renewal charge is — by the terms of the statute — discretionary with the Board of State Examiners. Consequently, in answer to your first inquiry, the Board does have the legal authority to decide whether or not the deferred renewal fee should be charged. The Board may properly decide in individual cases to charge only those fees which would have been payable had the license been continuously renewed (which fees must be paid in all cases) and to forego the assessment of any late charge.

You have informed me that in certain instances deferred renewal fees have already been imposed, and that the Board wishes to refund these charges to the particular applicants. You have asked whether the Board may properly request the State Treasurer to return these late charges. I find nothing in the statutes which regulate the functioning of the State Treasurer which would prohibit the Treasurer from complying with such a request. In the absence of pertinent sections of the General Laws which might control such transactions, it is my opinion that the Board of State Examiners may forward a request for refund of certain deferred renewal charges together with reasons therefor to the State Treasurer, and that the Treasurer may — if he deems the reasons sufficient — return the sums in question.

Very truly yours,

EDWARD W. BROOKE, *Attorney General*.

*The Department of Education should distribute funds of the State Aid Program to the cities and towns in accordance with the valuations appearing in c. 559 of the Acts of 1945.*

JUNE 29, 1964.

HON. OWEN B. KIERNAN, *Commission of Education.*

DEAR SIR: — I have received your letter of May 6, 1964 relating to the State Aid Program authorized by c. 70 of the General Laws. Distribution of amounts to the various cities and towns is governed by § 18 of c. 58 of the General Laws, which section at present provides in part as follows: “. . . the state treasurer shall on or before April fifteenth in each year distribute to the several cities and towns from the taxes on incomes under chapter sixty-two theretofore collected by the commonwealth the amounts required under chapter seventy to the extent that sufficient funds are then available. He shall on or before June fifteenth, October fifteenth and December fifteenth in each year, distribute to such cities and towns in proportion to the *amounts of the last preceding state tax imposed on them*, all such taxes collected before December first of such year and not previously distributed. . . .” (Emphasis supplied.)

The remainder of the section provides for the making of certain deductions prior to the authorized distribution.

Accordingly, State Aid amounts are distributed to the cities and towns in proportion to the sums levied upon such communities as taxes. Prior to the session of the General Court of 1963, the basis of apportionment of state and county taxes was established pursuant to c. 559 of the Acts of 1945, which chapter designated the amount of property in each municipality in the Commonwealth, and the amount of tax to be paid on each thousand dollars worth of such property. The determination of State Aid amounts has therefore depended upon the figures specified in the said St. 1945, c. 559.

By c. 660 of the Acts of 1963, the General Court enacted a new apportionment of state and county taxes, thus superseding St. 1945, c. 539. The Legislature specifically indicated that the new apportionment would be applicable “for the calendar year nineteen hundred and sixty-five, and until another is made and enacted by the general court.” (Section 1.) In addition, § 18 of c. 58 of the General Laws was amended by deleting the words “amounts of the last preceding state tax imposed on them”, and inserting in place thereof the words “valuations last established by the general court as a basis for the apportionment of state and county taxes.” (Section 7.) This change likewise becomes effective on January 1, 1965.

The General Court has made it clear that the valuations specified in St. 1963, c. 660 are not to take effect prior to 1965. This is true for the purposes of determining State Aid amounts as well, since the change made in c. 58, § 18 has also been suspended until that year. The effective date of the new provisions is of course not altered by times of distribution or by the fact that significant changes in valuation may have been made. Consequently, since the changes in question are not yet effective, your department should proceed on the basis of present law. The forms for State Aid for this year should be prepared in accordance with the valuations appearing in c. 559 of the Acts of 1945.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

*A Retirement Board in passing upon an application for an accidental disability retirement allowance is not bound by the statement of a medical panel required by G.L., c. 32, § 6(c), as to whether or not the disability is such as might be the nature and proximate result of the accident or hazard undergone. Dictum in Kelley v. Contributory Retirement Appeal Board, 341 Mass. 611 implying a contrary view, questioned. A decision of the State Retirement Board granting a retirement application is binding on the State Actuary.*

JUNE 30, 1961.

HON. C. EUGENE FARNHAM, *Commissioner of Insurance.*

DEAR COMMISSIONER FARNHAM: — I have received your letter of June 5, 1961 relative to the retirement applications of Joseph F. Moynihan and John J. Brennan, State Board of Retirement cases numbered 10634 and 10710, respectively. You have raised important questions concerning the effect of findings of certain medical panels and the scope of the decision-making authority of the State Board of Retirement.

Apparently, in the two instant matters, petitions for accidental disability retirement have been filed with the State Board of Retirement in accordance with the provisions of G.L., c. 32, § 7. The applicants have been examined by the medical panel specified in § 6(3) of said c. 32. This section provides in part that no applicant shall be retired:

“. . . unless a majority of the physicians on such medical panel shall, after such examination and after a review of all the pertinent facts in the case, certify to the board in writing that such member is mentally or physically incapacitated for further duty and that such incapacity is likely to be permanent, and, *in any case involving a retirement under section seven, the panel shall further state whether or not the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which such retirement is claimed under said section. . . .*” (Emphasis supplied.)

The medical panel reported in each case that disability was not the natural and proximate result of the accident in question.

Accordingly, you have posed the following seven questions:

- “1. May a Board of Retirement disregard a decision rendered by the Medical Panel, pursuant to the requirements set forth in chapter 32, section 6(3), if such decision answers in the ‘negative’ the statement ‘that the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which such retirement is claimed’?
- “2. May a Board of Retirement render a decision that the disability was the natural and proximate result of the accident or hazard undergone on account of which retirement is claimed, even though the Medical Panel pursuant to the requirements set forth in chapter 32, section 6(3) answers in the ‘negative’ the statement ‘that the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which such retirement is claimed’?
- “3. Would the fact that the Medical Panel answers in ‘negative’ the inquiry referred to in (1) and (2) above preclude the Board of

Retirement from making a contrary decision to the effect that the disability *was* the natural and proximate result of the accident or hazard undergone on account of which such retirement is claimed?

- "4. If the Board of Retirement makes a contrary decision, as referred to in (3) above, is such a decision an error of law?
- "5. If the Board of Retirement makes a decision as referred to in (3) above, does such constitute a violation of law, i.e., sections 6 and 7 of chapter 32?
- "6. If the Board of Retirement, having made a decision that the disability *was* the natural and proximate result of the accident or hazard undergone on account of which such retirement is claimed, and the Medical Panel pursuant to the above mentioned section 6(3) having answered in the negative the question numbered '3.', 'Is said disability such as might be the natural and proximate result of the accident or hazard undergone on account of which retirement is claimed?', may the Commissioner of Insurance conclude that an error of law occurred, constituting a violation of law which requires him to take the action as prescribed in section 24 of chapter 32?
- "7. If you answer No. 6 in the 'negative', must the Commissioner or his Actuary proceed in the instant claims with the calculations as prescribed in section 21, (3) (a) of said chapter 32?"

It is clear that three matters must be passed upon by the Medical Panel before disability retirement can be granted under c. 32, § 7. A majority of the physicians on the panel must certify in writing that the member who has made application is mentally or physically incapacitated for further duty. A majority must also certify in writing that such incapacity is likely to be permanent. Finally, a statement must be included whether the disability might be the natural and proximate result of the accident.

Affirmative findings of the Medical Panel on the first two questions are conditions precedent to consideration of the application by the State Board of Retirement. If the panel indicates that no disability exists, or that a disability is not likely to be permanent, the Retirement Board cannot overrule these findings and grant the member's application unless an error of law has been committed by the panel.

*Quincy Retirement Board v. Contributory  
Retirement Appeal Board*, 340 Mass. 56, 60

Of course, affirmative findings do not in and of themselves compel the Retirement Board to grant application.

It is my opinion, however, that the statement by the Medical Panel on the question whether disability might be causally connected to the accident does not bind the Retirement Board in the same way as the findings on the first two questions. The statute provides only that the panel shall state whether a causal connection might exist. It in no way implies that the Board is to be bound by such a statement, or that the Board is ousted of jurisdiction to grant the retirement application if the statement is negative. It should be noted that the Legislature has used the word "certify" in connection with the first two questions to be an-

swered by the panel, but calls only for a statement with respect to the third area. Such a statement is intended to be evidence to be considered by the Board, but is not meant to be binding. The decision-making authority of the Retirement Board should not be reduced in this fashion without some clear statutory indication that such was the intended result.

You have cited the recent case of *Anna L. Kelley v. Contributory Retirement Appeal Board*, 341 Mass. 611, and have suggested that its language might affect the above analysis. The *Kelley* case held, at page 613, that the statement of the medical panel on the question of causal connection should not be couched in decisive language, but should simply be a statement whether such a causal connection *might* be found to exist. You state in your letter that the Medical Panel must therefore answer either that the disability *might be* the natural and proximate result of the accident or that it *might not be* such a result.

Such alternatives are only slightly different ways of saying virtually the same thing, and I do not believe that the Supreme Judicial Court had such a result in mind when considering the *Kelley* matter. Rather, it is for the panel to state either that the disability *is* such as might be the natural and proximate result of the accident, or that it *is not* such as might so have resulted. In this way the Medical Panel can realistically be recorded either as believing that under no circumstances could disability and accident have been related.

I am aware that the dictum beginning at page 616 of the *Kelley* opinion implies that the Retirement Board is bound, absent an error of law, by a negative determination by the Medical Panel on the subject of causation. But the statute does not warrant such an interpretation, and until the Supreme Judicial Court speaks more definitely upon the subject I see no reason to limit the decision-making authority of the Retirement Board. It is not clear from the dictum whether the Court is actually addressing itself to the question of causation of disability, since the Court cites the *Quincy Retirement Board* case, a case involving substantially different problems. In addition, the Court speaks of the panel "certifying" on the question of causation, a clear misreading of the language of the statute, since the section calls only for a statement and not a certification.

Therefore, at least until this question is reconsidered by the Supreme Judicial Court, I advise you that a negative determination by the Medical Panel on the issue of causation is simply some evidence to be considered by the Retirement Board, and does not in and of itself prevent the Board from granting an accidental disability retirement application. Consequently, I answer your first two questions in the affirmative, questions 3, 4, 5 and 6 in the negative, and question 7 in the affirmative.

I would add one further note about the duties of the actuary as specified in c. 32, § 21 (3). The work to be performed by the actuary is set forth in this subsection. Among other duties, the actuary "shall check the calculation and amount of each annuity, pension or retirement allowance granted under the provisions of sections one to twenty-eight, inclusive, and all such calculations and amounts shall be subject to his approval."

It is not the business of the actuary to decide whether the Board has made an error in granting a retirement application. The actuary must of course approve the calculations and amounts arrived at; but he cannot refuse to check such calculations and amounts simply because he disagrees with the Board's determination that an allowance should be granted. To allow this would be to establish the actuary as a super-Board to review decisions, a situation obviously not contemplated by the statute. I advise you, therefore, that once the Board has rendered a decision, the actuary must thereupon proceed to check the calculations and amounts irrespective of what views the actuary may have as to the merits of the determination itself.

Very truly yours,

EDWARD W. BROOKE, *Attorney General.*

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